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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-773

SCOTT HUDGENS, AN INDIVIDUAL,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Scott Hudgens, an individual (herein "Hudgens"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on October 18, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals (A1-A15) is reported at 501 F. 2d 161. The supplemental decision and order of the National Labor Relations Board (A17-A20) is reported at 205 NLRB No. 104 (1973). The initial decision and order of the Board (A33-40) is reported at 192 NLRB No. 111 (1971).

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit (A1-A15), enforcing the supplemental decision of the National Labor Relations Board, issued on September 25, 1974. The Court thereafter entered judgment (A16) on October 18, 1974. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

I.

Do the standards of *Babcock and Wilcox*[1] govern when private property rights are to be dislocated in favor of rights under the National Labor Relations Act where there is no labor dispute at the picketed premises; or, as held by the lower court, does *Central Hardware*[2] require that such standards be limited to organizational campaigns only?

II.

If *Babcock and Wilcox* principles are confined to adjusting property rights only in an organizational context, to what extent are alternative avenues of communication required to be utilized before property rights may be confiscated when the activity involved is only indirectly related to the situs?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U. S. C. § 151 *et seq.* (the "Act") are set forth below:

* * * * *

1. *N. L. R. B.* v. *Babcock and Wilcox Co.*, 351 U. S. 105 (1956).
2. *N. L. R. B.* v. *Central Hardware Co.*, 407 U. S. 539 (1972).

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

* * * * *

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * *

STATEMENT OF THE CASE

Petitioner's North DeKalb Shopping Center, located in Decatur, Georgia, is a modern complex in which a substantial investment has been made to secure a comfortable and attractive enclosed mall shopping area to permit shopping in an atmosphere free of distraction or interference.

One of the Center's sixty tenants is the Butler Shoe Store which has nine retail stores in the greater Atlanta, Georgia area. Although no employee of that store was involved in any union activity, and there was no labor dispute at the Center, various individuals employed by Butler at its Atlanta warehouse and represented by Local 315, Retail and Wholesale Department Store Union, engaged in picketing at the Center. The picketing, which also occurred at the other Butler retail stores, was conduced in the midst of the common aisleways of the Center's enclosed mall adjacent to the Butler store in furtherance of the Union's contract demands at the warehouse.

When the pickets declined the Center manager's request to remove themselves to an area outside of the enclosed mall, he threatened to have the police remove them. They then left

and filed charges with the Board which found that a violation of section 8(a)(1) of the Act was thereby committed. (A33-A40.) Hudgens immediately sought review, pursuant to section 10(b) of the Act, in the Court of Appeals for the Fifth Circuit.

During the pendency of that appeal, this Court's decisions in *Central Hardware* and *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972), issued, and the Board obtained a remand to reconsider its decision in light of those cases. In its supplemental order (A17-A20), which is the subject of this proceeding, the Board professed to apply the *Babcock* standards, but did not. Instead, when the case again was heard on Hudgen's petition for review to the Fifth Circuit, Board appellate counsel expressly disavowed any reliance on *Babcock* (A6); and the court below found *Babcock* inapplicable, holding that it applies to *organizational* activities only. In lieu of *Babcock*, the court posited a new test: that where, as here, activity conducted on private property is *indirectly* related to that property, it must be permitted, in derogation of private property rights, since alternatives thereto are, in the Court of Appeals' view, rarely available (A12-15). In short, by emasculating the doctrine of alternative channels of communication, the Court defined that standard out of existence.

REASONS FOR GRANTING THE WRIT

Review by this Court of the decision below is warranted. *First*, by rejecting the settled *Babcock and Wilcox* doctrine, and adopting instead wholly different criteria for adjusting constitutionally protected private property rights with section 7 activity, the decision below has occasioned a substantial dislocation in the administration of the National Labor Relations Act. *Second*, the decision below undesirably conflicts with a recent decision[3] of the Court of Appeals for the Third Circuit. *And finally*, if, as the lower court held, *Babcock and Wilcox* does not apply, this Court should direct itself to a question it hereto-

3. *N. L. R. B.* v. *Visceglia, t/a Peddie Buildings*, 498 F. 2d 43 (3rd Cir. 1974).

fore has not decided—the scope of the alternatives required to be utilized where the activity at issue is only *indirectly related* to the purposes to which the private property is being utilized.

A. For nearly two decades of uniform application—up to the subject decision of the Court of Appeals—*Babcock and Wilcox* has mandated that the section 7 rights of non-employees must yield to the constitutionally protected rights of private property owners. The only exception was where alternative channels of communication were shown to be unavailable. The instant case emasculates that settled principle. In the lower court's view, *Babcock and Wilcox* is, contrary to the Board's own view (A6, A31), confined only to union *organizational* activity and is rendered inapplicable to other forms of section 7 activity. All other activity is to be evaluated by a different standard purportedly derived from the *constitutional* principles applied by this Court in *Lloyd* and *Logan Valley*[4] (A8-9, A13.)

This view flies in the face of the plain teaching of *Central Hardware* that constitutional principles do *not* control in assessing whether there is a violation of the Labor Act. *Central Hardware*, in fact, rejected precisely such a constitutional concept and this Court, in remanding that case to the Board for reconsideration in light of *Babcock and Wilcox* (407 U. S. at 545), declared that "[w]hile it is true that Logan Valley involved labor picketing, the decision rests on constitutional grounds, it is not a §7 case." Indeed, recognizing this import of *Central Hardware*, the Board in the instant case, after obtaining a remand from the Court of Appeals to reconsider its original order in light of *Central Hardware*, stated that "[c]learly the test now to be applied to the case at bar is that set out in *Babcock and Wilcox*." (A31.) The Court of Appeals' contrary view—that "[p]roper resolution of the instant case cannot be reached through . . . *Babcock and Wilcox* . . ."—ignores the section 7 nature of this case and carves out an unwarranted exception to *Central Hardware*.

4. *Amal. Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968).

B. There is no justification for the Court of Appeals' refusal to follow *Babcock and Wilcox* and *Central Hardware*. It is anomalous, in light of the objective of the Act, to impose upon those persons seeking to exercise organizational rights—rights which embody the heart of the Act—the obligations imposed by *Babcock and Wilcox*, while at the same time permitting individuals exercising nonorganizational activity—which is assumedly less protected by the Act—freedom from those very obligations. Moreover, whether activity is organizational in purpose or not, the same media devises used by Butler and Hudgens to draw potential customers to the Center similarly constitute viable alternatives for inviting customers *not* to patronize. There is no reason to differentiate the instant case, merely, because of the Union's desire to engage in consumer picketing, and to thereby conclude "the quantum and type of proof which *Babcock and Wilcox* and its progeny . . . require" to be irrelevant. (A13.) The Union, after all, was involved in an economic contest[5] in which, to exert maximum pressure, it sought to communicate its message throughout the greater Atlanta area. If, as Hudgens proved (A13), other means of communication besides picketing were actually less expensive and more effective, why would utilization of such methods be "unreasonable" and only "a location at or near the mall" (A14) suffice? This distorted view of available alternates requires, it is submitted, review by this Court.

C. The Court of Appeals' decision also directly conflicts with the recent decision of the Court of Appeals for the Third Circuit in *N. L. R. B.* v. *Visceglia, t/a Peddie Buildings*, and hence creates an undesirable lack of uniformity in the administration of the Act.

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5. The Board (A30) thus erred in concluding that the Union should not be required to "squander its assets in this fashion." The Act does "[not] contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union." *N. L. R. B.* v. *Ins. Agents Int'l Union*, 361 U. S. 477, 490 (1960).

In *Peddie*, the owner of an industrial park was, like Petitioner here, found guilty of violating section 8(a)(1) for threatening with arrest persons who, although they had no work relationship at the situs, nevertheless engaged in nonorganizational picketing on park property in furtherance of an economic dispute with one of the park's tenants. This conclusion was premised on the Board's view that, for "the reasons expressed by the Supreme Court in *Central Hardware, supra*, we find . . . the principles of *Babcock and Wilcox* . . . to be applicable to the present case." 203 NLRB No. 27, 83 LRRM 1066 (1973). Thereafter, in the instant case, the Board applied the same reasoning; it expressly predicated its finding of Hudgens' violation on "the reasons specifically set forth in [*Peddie*]." (A18.) Subsequently, however, the Third Circuit denied enforcement to the Board's order in *Peddie* on the ground that "the Board did not evaluate qualitatively or quantitatively a significant number of ingredients in the [*Babcock*] balancing test which it applied." 498 F. 2d at 50. Thus, in the Third Circuit, *Babcock* applies and non-employees must prove, under that test, the unavailability of alternative channels as a condition to appropriating constitutionally protected private property rights in the name of section 7, regardless of whether the purpose of the activity involved is organizational or not.[6] A far different rule, as described above, applies in the Fifth Circuit. This undesirable dislocation in the administration of the Act is a further reason for review by this Court.

D. Even assuming *arguendo* that the *Babcock and Wilcox* test does *not* apply in the present case, then this Court should resolve the question of what constitutes an alternative avenue of communication where, as here, the activity involved is only *indirectly related* to the purposes of the Center. The "indirectly related" situation is one which this Court has specifically recog-

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6. The Court of Appeals' assessment that "the picketing in the instant case [is] clearly distinguishable from that in *Peddie Buildings*" (A15 n. 14) is wholly unexplained and unjustified. The two cases, as the Board concluded, must be governed by the same criteria regardless of whether, on the facts, those criteria would yield the same or a different result.

nized, but with respect to which it has not yet established the requisite standards. This case, accordingly, provides an appropriate vehicle for considering this important recurring question.

Neither *Lloyd* nor *Logan Valley* is dispositive of the "indirectly related" issue. In *Lloyd*, the disputed conduct was totally unrelated to Lloyd Center. On the other hand, in *Logan* the picketing was directly related to the non-union status of employees at the Weis Supermarket located in the center there involved; *Logan* was a "directly related" situation *because* "the message sought to be conveyed to the public concerned the *manner in which the particular market was being operated.*" *Lloyd*, 407 U. S. at 560, quoting *Logan*, 391 U. S. 320 n. 9 (emphasis added). Because the picketing in *Logan* was thus directly related to the manner in which a center store was being operated, reliance on alternative means of communication was only minimally required, as the property owner had it within his power to correct the alleged abuses. Conversely, in *Lloyd*, where there was no dispute concerning the manner of operation of the center or a tenant's business and, therefore, nothing the property owner could do to resolve the subject of the protest, there was a far greater need to examine available alternatives as a condition to dislocating property rights. *Lloyd*, 407 U. S. at 567.

The subject case, it is submitted, is closer to the *Lloyd* situation due to the undisputed absence of any labor dispute at the North DeKalb Center's premises or any concern with "the manner in which [a] particular [store] was being operated."[7] It is, at most, an "indirectly related" situation—a situation this

7. Here, as in *Lloyd*, there was no dispute at the situs of the Center. In *Lloyd*, the message was aimed at the general population of the greater metropolitan area. Similarly, here, the Union picketed at all nine Butler locations in the greater metropolitan area, in an effort to reach the population of greater Atlanta. Thus, the alternatives required to be utilized in *Lloyd*, should similarly be required here, especially because, as demonstrated below, alternatives, such as the media utilized by the property owner; are actually more effective and less expensive than the cost of maintaining pickets at all nine locations.

Court recognized in *Lloyd*, 407 U. S. at 564, but did not consider with respect to required reliance on alternatives to picketing. Because of the significance of this problem and the necessity, demonstrated by this case, to resolve this unanswered question of *Logan Valley* and *Lloyd* as well as the conflict between the standards enunciated in this case and *Peddie*, certiorari should be granted to provide much needed guidance in this area.

CONCLUSION

For the foregoing reasons, Scott Hudgens respectfully prays that this petition for writ of certiorari be granted.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
Fifth Circuit

Sept. 25, 1974

SCOTT HUDGENS, an Individual,
Petitioner-Cross-Respondent,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross-Petitioner.

No. 73-3264

Before WISDOM and CLARK, *Circuit Judges,* and GROOMS, *District Judge.*

CLARK, *Circuit Judge:*

This case requires us to reach an accommodation under the National Labor Relations Act (NLRA) between private property rights and the right to picket in aid of a legal strike. The specific issue presented is whether a shopping center owner violated sections 7 and 8(a)(1) of the NLRA[1] by prohibiting warehouse employees of the company owning one of the center's retail store tenants from picketing the entrances to the store in aid of a strike by the warehouse employees. We affirm the find-

1. Section 7, 29 U. S. C. § 157, provides in relevant part:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

Section 8(a)(1), 29 U. S. C. § 158(a)(1), provides in part:

"It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title."

ing by the National Labor Relations Board (Board) of an unfair labor practice and enforce its order.

I.

The individual petitioner, Scott Hudgens, owns North DeKalb Shopping Center, a large 60-store retail shopping center located in unincorporated suburban Atlanta, but drawing its customers from throughout the metropolitan Atlanta area. Like many modern shopping centers, this one consists of a single large building constructed around an enclosed mall. The mall provides an arcade 40 feet in width which is intersected by 30 foot wide auxiliary aisles connecting it to public entrances opening on the surrounding parking area. Although some center stores have entrances fronting only the parking lot and a few can be entered from either the mall or the parking area, most can only be entered from the mall. Eighty-five to ninety percent of the customers of these latter stores enter the building through one of the four primary entrances to the mall. A raised sidewalk encircling the building separates it from the large adjacent parking lot. There are five driveway entrances to the parking lot. Hudgens, as landlord, has a continuing interest in the commercial success of the center's tenants, since his leases with all but one of the stores are of the percentage type, *i.e.*, rentals are calculated on a ratio of a tenant's gross sales over a guaranteed minimum rent. Additionally, Hudgens maintains a security system and exercises control and care of the common areas of the shopping center, including the mall itself and the parking lot.

In January 1971 warehouse employees of the Butler Shoe Company in Atlanta went on strike protesting the company's failure to agree to certain union demands in its contract negotiations with Local 315, Retail and Wholesale Department Store Union AFL-CIO, the bargaining representative of the warehouse employees.[2] To support this strike, the union decided to picket

2. The employees of Butler's store in the North DeKalb Shopping Center are non-union.

not only the Butler's warehouse but all of its retail stores in the Atlanta area as well.[3] Accordingly, on January 22, 1971 four warehouse employees went to North DeKalb Mall with signs reading "Butler Shoe Warehouse on Strike, AFL-CIO Local 315" to picket the two entrances to the Butler Shoe Store, both located inside the mall. Before the store opened for the day's business, Douglas Ballard, the general manager of the shopping center, noticed the potential pickets and asked them to leave, stating that picketing was not permitted in the mall under any circumstances.[4]

The warehouse employees left, but returned within the hour and began picketing in front of the entrances to Butler's.[5] After they had picketed for about thirty minutes, Ballard informed them by telephone that he would have them arrested for trespassing, if they continued. The pickets then departed, and subsequently, the union filed an unfair labor practice charge against Hudgens with the Board.

II.

On stipulated facts the Board interpreted Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc., 391 U. S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968);[6] to hold

3. Except for Hudgens' actions, all such picketing was without incident.

4. There is a conflict in the record as to exactly what Ballard told the pickets. At the remand hearing three of the pickets testified that Ballard told them that they would have to leave the property entirely and picket on the public streets surrounding the shopping center. An affidavit by Ballard, attached as an exhibit to the parties' stipulation, supports this testimony. Ballard testified on remand, however, that he said: "[w]e don't allow people to picket on the mall. They have to be outside on the sidewalk or either at North Druid Hills or Lawrenceville Highway on the right-of-way, one or the other . . . [y]ou just don't picket on my mall."

5. This picketing was peaceful and limited to the mall area immediately adjacent to the Butler's store entrances.

6. *Logan Valley* held that a state court injunction secured by a shopping center owner prohibiting picketing in protest to the non-union status of one of the center's stores violated the pickets' First

that a shopping center, during the times that it is open and accessible to the public, is the functional equivalent of the community business block, long associated with the exercise of First Amendment rights;[7] and that the mere fact of ownership was not enough to "justify restrictions on the place of picketing." It then found "that *Logan Valley* establishes the union's right to picket at the location it chose, and that the Respondent's (Hudgens') threats to cause the arrest of the pickets for criminal trespass if they continued to refuse to leave the enclosed mall, unlawfully interfered with protected concerted activities in violation of section 9(a)(1) of the Act."[8]

During the pendency here of Hudgens' petition for review of this decision, the Supreme Court decided Lloyd Corp. v. Tanner, 407 U. S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972) and Central Hardware Co. v. NLRB, 407 U. S. 539, 92 S. Ct. 2238, 33 L. Ed. 2d 122 (1972). In *Lloyd* the Court upheld the right of the corporate owner of a large Portland, Oregon shopping mall to apply its non-discriminatory no solicitation rule to exclude anti-Viet Nam war pamphleteers from the center's interior. Finding that the constitutional inquiry must be broader than a

and Fourteenth Amendment free speech rights. The Court relied heavily on Marsh v. Alabama, 326 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946), which had considered the streets of a company owned town as the functional equivalent of a public business district for purposes of allowing First Amendment activity and held that a shopping center was similarly the functional equivalent of a public business district at least under the facts of that case.

7. *See, e.g.*, Lovell v. Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938).

8. The Board's order required Hudgens to "[c]ease and desist from threatening to cause the arrest of any union members while peacefully picketing as part of protected concerted activity within the enclosed mall area of Respondent's shopping center, or in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights of self-organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection; and to refrain from any and all such activities."

simple in rem determination of whether a particular shopping center is the functional equivalent of a municipal business district, *Lloyd* established the appropriate initial inquiry to be whether the conduct assertedly protected by the First Amendment was "directly related in its purpose to the use to which the shopping center property [is] being put," 407 U. S. at 563, 92 S. Ct. at 2226, 33 L. Ed. 2d at 140. If so, giving explicit recognition to the shopping center owner's constitutionally protected private property rights, the Court held that an accommodation between these rights and the asserted First Amendment rights required those asserting the right to use the property of another to show that reasonable alternative means of conveying their message to its intended audience are unavailable before access for this purpose will be required. Since the message in *Lloyd*, intended for the general public, had no relationship to the operation of the shopping center, and since other means of reaching such a generalized audience were readily apparent, the Court found that neither of these criteria had been met.

In *Central Hardware* the owner of two self-contained non-union retail hardware stores had prohibited non-employee union organizers from soliciting his employees in the stores' parking lots. The Board held that the "character and use" of Central's parking lots made *Logan Valley* controlling, and the Eighth Circuit affirmed. In reversing, the Court noted that *Logan Valley* rested on constitutional grounds, and was not a section 7 case. It then held that the controlling standards were those set out in NLRB v. Babcock & Wilcox Co., 351 U. S. 105, 76 S. Ct. 679, 100 L. Ed. 975 (1956). *Babcock & Wilcox* held that non-employee organizers seeking to solicit on an employer's private property must show, as a precondition, a lack of reasonable alternative means of reaching the employees. Furthermore, in *Central* the Court went on to note that in any event the Board had misapplied *Logan Valley*, since in order to meet the Fourteenth Amendment's threshold state action requirement, property must have assumed "to some significant degree the functional

attributes of public property devoted to public use," 407 U. S. at 547, 92 S. Ct. at 2243, 33 L. Ed. 2d at 128, a circumstance present in *Logan Valley* (and in *Lloyd*) but not present in the case of Central's parking lot.

In view of the relevance of *Lloyd* and *Central Hardware*, we remanded the instant case to the Board for reconsideration, a hearing was held before an administrative law judge, and evidence was presented to supplement the prior stipulation. The administrative law judge read *Central Hardware, supra,* to require him to apply the *Babcock & Wilcox Co.* test, but he found that since "the union had no other reasonable access to Butler's customers coming to the DeKalb shopping center," its requirements had been met. The Board affirmed the administrative law judge's decision for the reasons it had previously set out in Frank Visceglia and Vincent Visceglia, d/b/a Peddie Buildings, 203 NLRB No. 27, enforcement denied, N. L. R. B. v. Visceglia, 498 F. 2d 43 (3d Cir. 1974).[9] Its rationale was that Butler's warehouse employees were within the scope of Hudgens' invitation to the public to come to the shopping center to do business with its tenants; "[t]hat being the case, Butler's employees could not be designated as unacceptable and excluded from the mall solely because they chose to engage in protected concerted activity." Furthermore, the Board was of the view that picketing directly in front of Butler's store would avoid the possible secondary effects attending picketing at a more distant location, which might "well be a common situs for entrance to other places of business."

III.

Changing horses in midstream, the Board argues on appeal that this case is controlled by Republic Aviation Corp v. NLRB, 324 U. S. 793, 65 S. Ct. 982, 89 L. Ed. 1372 (1945).

9. *Peddie Buildings* involved picketing on private property at the entrance to an industrial park in which was located a plant owned by the company that was the subject of the picketing.

Republic Aviation approved the Board's *Peyton Packing Co.* presumption, 49 NLRB 828 (1943), enforced, 142 F. 2d 1009 (5th Cir.), cert. denied, 323 U. S. 730, 65 S. Ct. 66, 89 L. Ed. 585 (1944); which held it to be an unfair labor practice for an employer to enforce a no solicitation rule against employee organizers unless it could be proven that such a rule was necessitated by special circumstances, *i.e.*, to maintain production or discipline. The availability of alternative means for the employee organizers to communicate with the other employees is not relevant to this inquiry.[10] Therefore, the Board reasons that since Hudgens offered no proof the picketing interfered with the normal functioning of the shopping center, the pickets could not be excluded.

Hudgens' main appellate argument is that *Central Hardware* requires this case be adjudicated by the standards of *Babcock & Wilcox*. He contends that the Board's General Counsel failed to carry his burden of proving there were no "other available channels of communication" which would have enabled the union to reach its intended audience with its message, *see, e.g.*, Diamond Shamrock Co. v. NLRB, *supra,* n. 10; McDonald Douglas Corp. v. NLRB, 472 F. 2d 539 (8th Cir. 1973); and NLRB v. Tamiment, Inc., 451 F. 2d 794 (3d Cir. 1971). Additionally, Hudgens argues that his evidence established that "[t]he union in this case manifestly had countless, varied means of communication, in addition to the picketing here at issue, available to reach its desired audience," including picketing at the four entrances to the enclosed mall, in the parking lot, and on the public thoroughfares near the shopping center; advertising by newspaper, radio and television; and use of other media, such

10. This is the rule in this circuit, *see* Republic Aluminum Co. v. NLRB, 394 F. 2d 405 (5 Cir. 1968) (en banc), and apparently the majority rule, *see* Diamond Shamrock Company v. NLRB, 443 F. 2d 52, n. 27 (3d Cir. 1971). The Third Circuit however, requires that the Board consider whether alternative means of communication are available before invalidating an employee no solicitation rule. *See* NLRB v. Rockwell Mfg. Co., 271 F. 2d 109 (1959).

as direct mail, handbills, and billboards to reach potential Butler's customers.

Proper resolution of the instant case cannot be reached through a per se application of either *Republic Aviation* relied upon by the Board, or *Babcock & Wilcox* relied upon by Hudgens. Both of those cases balanced conflicting interest to reach an accommodation.[11] There is no question that employees have the abstract right to picket their employer wherever he is located, *see* NLRB v. Local 810, Sheet Metals, etc., 460 F. 2d 1 (2d Cir. 1972); and Local 761, Electrical Workers v. NLRB, 366 U. S. 667, 672, 81 S. Ct. 1285, 1289, 6 L. Ed. 2d 592, 596 (1961). However, equally valid are Hudgens' property rights. The requisite solution of this case requires a balancing of the two, but because the interests are significantly different neither formula urged by the parties exactly fits. The Board's position is farthest afield. It takes a very broad view of who is to be considered an employee of Butler's within the rule of *Republic Aviation*, then uses the result as a basis for impinging upon the property rights of Hudgens, who clearly is not their employer in even the broadest sense. Such a misapplication of *Republic* is particularly inappropriate, because there the employee organizers "were lawfully and properly on the employer's premises pursuant to the work relation-

11. *Republic Aviation* placed in the scales the relevant labor-property interests where an employer had banned all solicitation of fellow employees by union adherents already in his employ. *Babcock & Wilcox* balanced organizational rights asserted by non-employees against an employer's property rights. In this latter case, the Court said:

> "Accommodation between [organization rights and property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organizations; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize."

351 U. S. at 112, 76 S. Ct. at 684, 100 L. Ed. at 982.

ship;" hence no employer interests existed which are comparable to the private property rights of Hudgens in the instant case.[12] Furthermore, any decision in this case which ignored or failed to weigh Hudgens' property rights would disregard the emphasis in *Lloyd* and *Central Hardware* on the need for protection of such rights.

Hudgens' insistence that we are bound to apply the test of *Babcock & Wilcox* is not technically correct. There, the property rights were those of the employer, not a third party; and the labor rights involved were organizational rights, not consumer picketing rights. Indeed in both *Babcock & Wilcox* and *Central Hardware* the court carefully limited its consideration to organizational cases. Although the consideration of alternatives required by *Babcock & Wilcox* is relevant to proper resolution of today's case, it is not the complete answer in consumer picketing cases.

IV.

Recognizing that the rules urged upon us by both Hudgens and the Board do not address themselves to the kind of variables present in the instant case, the United States Chamber of Commerce as amicus curiae has suggested a different tack. It urges that we should apply a test it derives by blending *Lloyd* and *Logan Valley, i.e.*, "private property becomes subject to protest or propaganda activity when both of the following are satisfied: (a) the protest is related to the use to which the property is put and (b) there exists no reasonably effective alternative means of communication to reach the intended audience." Amicus' argument that criterion (b) has not been satisfied tracks Hudgens' arguments as to failure to satisfy *Babcock & Wilcox*. It

12. The controlling significance of this difference in rights was recognized in Diamond Shamrock Co. v. NLRB, *supra*, a case which applied the non-employee standards of *Babcock & Wilcox* rather than the employer standards of *Republic Aviation* to organizational solicitation by off-duty employees. *See also*, GTE Lenkurt, Inc., 204 NLRB No. 74 (1973), and NLRB v. Great Atlantic & Pacific Tea Co., 277 F. 2d 759 (5th Cir. 1960).

further argues that criterion (a) was not satisfied either because the direct relationship test here would require that the picketing involve a shopping center store in the sense that "the adverse effects of the dispute must directly jeopardize the employees working at that site (the store tenant)."[13]

Section 7 rights are not necessarily coextensive with constitutional rights, *see* Central Hardware v. NLRB, *supra* (Brennan, J., dissenting). Nevertheless, we agree that the rule suggested by amicus, although having its genesis in the constitutional issues raised in *Lloyd*, isolates the factors relevant to determining when private property rights of a shopping center owner should be required to yield to the section 7 rights of labor picketers. The first consideration—the relationship between the picketing and shopping center operations—is relevant to determining whether the pickets have any right at all to conduct consumer-employer picketing inside a private enclosed mall, while the second consideration assays these picket rights against the conflicting property rights of the center owner. However, we do not apply these dual considerations in the same manner as amicus, nor de we reach the same result.

A. *Relationship Between the Picketing and Normal Functions of the Shopping Center*

The objects of the picketing were those employed by and those who might patronize the Butler store in the North DeKalb Mall, and the message concerned the fact that ware-

13. Amicus argues that the picketing must be at least as directly related to the business of the shopping center as the picketing was in *Logan Valley*. For this proposition amicus relies on Mr. Justice Marshall's caveat in footnote 9 of *Logan Valley*:

> "[w]e are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not *thus* directly related in its purpose to the use to which the shopping center was being put." [Italics ours]

391 U. S. at 320, 88 S. Ct. at 1609, 20 L. Ed. 2d at 613 (1968); and Mr. Justice Douglas's concurring opinion in *Logan Valley*.

house employees of Butler's were on strike. Potential customers of Butler's North DeKalb store comprised a group within the scope of the broad invitation issued by Hudgens to the public to come and shop at center stores. The picketers' message to withhold patronage from the Butler store was directly related to Hudgens' invitation, although not specifically related to the operation of the particular Butler store in the North DeKalb Mall. The appropriate focus is on the message sought to be conveyed and its intended audience, not, as the amicus urges, on whether the labor dispute in fact was precipitated by something involving the operation of one particular store in the shopping center. The Court's opinion in *Lloyd* reflects the need to focus on the scope of the invitation extended to the public. *See* 407 U. S. at 556-566, 92 S. Ct. at 2226-2227, 33 L. Ed. 2d at 135. Indeed, the issue in that case distinctly included the extent of dedication to public use and not simply the degree of relationship between the actual operation of the shopping center and the picketing. Neither logic nor precedent requires that picketing be directly related to the actual operation of an individual store in the shopping center as was the case in *Logan Valley*. Although the facts in *Lloyd* were different—the anti-Viet Nam War handbilling here had "no relation to any purpose for which the center was built and being used," 407 U. S. at 564, 92 S. Ct. at 2226, 33 L. Ed. 2d at 140—the rationale is fully applicable here.

Additionally, acceptance of the strict relationship requirement urged upon us by amicus would mean that "businesses situated in the suburbs could largely immunize themselves from . . . criticism (in many circumstances) by creating a cordon sanitaire of parking lots around their stores." Logan Valley, *supra*, 391 U. S. at 325, 88 S. Ct. at 1612, 20 L. Ed. 2d at 615, cited with approval in *Lloyd*, 407 U. S. at 562, 92 S. Ct. at 2225, 33 L. Ed. 2d at 139. If we were to adopt such a narrow view, a chain which had all its retail outlets located in enclosed shopping centers could prevent direct picket con-

tact with its customers at all stores whenever the dispute was by workers in any non-retail division. Then too, if the dispute related to the operation of one particular store, only that store could be picketed. The result would be to confer upon an employer an ability to limit the effectiveness of publicizing labor disputes by insulating its trade inside shopping centers. Even where the union could prove the inadequacy of alternative means of reaching the customers of a store, effective picketing would be cut off. The end result would be that employees' protected right to picket their employer wherever he is located, *see* NLRB v. Local 810, Sheet Metals, Etc., *supra;* and Local 761, Electrical Workers v. NLRB, *supra,* would be nullified.

In short, we find the picketing in the instant case was sufficiently related to the business of the North DeKalb Shopping Center to meet the requirements of the relationship test enunciated in *Lloyd.*

B. *Alternative Channels of Communication*

What alternatives to picketing in the mall existed?

It is crucial for any analysis to recognize from its outset that the intended audience of the picketing in the instant case included not only the employees of Butler's at the North DeKalb Shopping Center but also the potential customers of Butler's North DeKalb store. This latter audience was only identifiable as part of the citizenry of greater Atlanta until it approached the store, and thus for the picketing to be effective, the location chosen was crucial unless the audience could be known and reached by other means.

This contrasts with organizational campaigns in which the audience solicited is composed of employees of a particular employer, a limited usually identifiable group, which often can be reached very effectively by means other than personal contact on the employer's private property. Indeed, in what is perhaps an implicit recognition of the judicial belief that this sort

of conduct can take place anywhere, courts have rarely found that the general counsel met the burden of proving a lack of adequate alternatives to solicitation on an employer's property. *See* NLRB v. Solo Cup Co., 422 F. 2d 1149, 1151 (7th Cir. 1970), quoting from Broomfield, Preemptive Federal Jurisdiction over Concerted Trespassory Union Activity, 83 Harv. L. Rev. 552 (1970), and *compare* NLRB v. S & H Grossinger's, Inc., 372 F. 2d 26 (2d Cir. 1967), *with* NLRB v. Kutsher's Hotel and Country Club, 427 F. 2d 200 (2d Cir. 1970), and NLRB v. Tamiment, 451 F. 2d 794 (3d Cir. 1971). Thus, the quantum and type of proof which *Babcock & Wilcox* and its progeny involving organizational rights require on the issue of alternative avenues of communication is not necessarily relevant here.

Hudgens certainly takes an over-broad position in urging that the General Counsel was required to establish that television and radio advertising, direct mailing, and other advertising devices directed at the geographical area from which the Butler's store at North DeKalb Shopping Center draws its customers would be unavailing. Such alternatives might be part of the General Counsel's burden in a particular organizational situation, *cf.* The Falk Corp., 192 NLRB 716 (1971), *but see* NLRB v. United Aircraft, 324 F. 2d 128, 130 (2d Cir. 1963). However as substitutes for consumer picketing in a case involving an audience not readily identifiable, and requiring saturation coverage of a large, populous geographical area, such a burden is patently inappropriate. Hudgens' testimony as to the low unit cost and the effectiveness of these advertising methods does not demonstrate that they constituted an acceptable substitute for picketing. That they were useful and utilized by the shopping center to attract customers from the general public does not establish that they were viable alternatives for taking the pickets' message to Butler customers and employees.

Indeed, even in *Lloyd* the Court did not consider this type of alternative, although the audience that the *Lloyd* handbillers

sought to reach, the public in general, might seem to lend itself to almost any kind of approach. It must also be noted that all of the Butler stores in the Atlanta area were being picketed at the time the instant dispute arose. Since North DeKalb Shopping Center draws its customers from the entire Atlanta area, it would be totally unreasonable to require the union to advertise through the entire Atlanta area to reach the potential customers of this one remaining store. An accommodation which required such a procedure would unjustifiably denigrate section 7 rights.

Lloyd burdens the General Counsel with the duty to prove that other locations less intrusive upon Hudgens' property rights than picketing inside the mall were either unavailable or ineffective. However, as previously noted, the realities of the situation establish that part of the audience the pickets sought to reach was not identifiable, other than as citizens of metropolitan Atlanta, until it approached the store. By the nature of the use to which the property was put and because of the advertised invitations of Hudgens and Butler's to shop at North DeKalb's stores, a location at or near the mall was essential to any kind of reasonably effective communication. The alternatives of picketing at the mall entrances or on the parking lots were not available to the union. Confronted with this conflicting testimony on this issue, the administrative law judge found as a fact that Ballard (the shopping center manager) told the pickets that they would have to remove themselves to the public thoroughfares. We accept this finding. *See* Great Atlantic & Pacific Tea Co. v. NLRB, 354 F.2d 707, 709 (5th Cir. 1966); NLRB v. Universal Packing & Gasket Co., 379 F.2d 269, 270 (5th Cir. 1967); and NLRB v. Longhorn Transfer Service, Inc., 346 F.2d 1003 (5th Cir. 1965). Nor was picketing on the public streets adjacent to the shopping center an acceptable alternative. The closest such location for picketing was approximately 500 ft. from the mall. The problems with this type of picketing were recounted in part by the Court in

Logan Valley: (1) difficulty in reading picket signs, (2) traffic danger to pickets and (3) difficulty and hazard in handing out handbills. *See* 391 U.S. at 321-322, 88 S.Ct. at 1610, 20 L.Ed.2d at 613. Additionally, the farther the message is removed from the point at which action is to be taken the greater the potential for dilution or total loss of effect. Of course this is a matter of degree. Clearly, a union does not have an absolute right to picket at every point of optimum effect regardless of its result upon other competing interests. Nevertheless, the potential for dilution is relevant to a consideration of adequate alternatives. Finally, picketing at the entrances to the shopping center parking lot or on the streets leading into the parking lot would render it difficult for the union to limit the effect of its picketing to Butler's only. *See* Logan Valley, supra, 391 U.S. at 323, 88 S.Ct. 1611, 20 L.Ed.2d 614.[14] Therefore, we hold that alternatives to picketing inside the mall were either unavailable or inadequate.

The petition for review is denied and the Board's order is Enforced.

14. *Peddie Buildings, supra,* relied upon heavily by Hudgens, even if binding upon us would not compel us to reach a different result, the picketing in the instant case being clearly distinguishable from that in *Peddie Buildings.*

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

SCOTT HUDGENS, an Individual
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. 73-3264

JUDGMENT

Before: WISDOM and CLARK, *Circuit Judges*, and GROOMS, *District Judge*.

This Cause came on to be heard upon a Petition filed by Scott Hudgens, an Individual, to review an order of the National Labor Relations Board issued against Petitioner, his officers, agents, successors and assigns on August 16, 1971, as reaffirmed by its supplemental order of August 21, 1973, and upon the cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on May 14, 1974, and has considered the briefs and transcript of record filed in this cause. On September 25, 1974, the Court handed down its decision granting enforcement of the Board's order and denying the petition for review.

On Consideration Whereof, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Scott Hudgens, an Individual, his officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

Entered: Oct 18, 1974

Issued as Mandate: Nov. 11, 1974

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL RELATIONS BOARD

SCOTT HUDGENS, an Individual
and
LOCAL 315, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO
Case 10—CA-8823

SUPPLEMENTAL DECISION AND ORDER

On August 16, 1971, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that Respondent, Scott Hudgens, had violated Section 8(a)(1) of the National Labor Relations Act, as amended, by threatening to cause the arrests of the Charging Party's pickets, employees of the Butler Shoe Company, while they were engaging in protected activity under Section 7 of the Act and ordering that Respondent cease and desist therefrom and take certain affirmative action.

Thereafter, Respondent filed a petition for review and the Board filed a cross-petition for enforcement of the order with the United States Court of Appeals for the Fifth Circuit. While the case was before the court of appeals, the Supreme Court issued its decisions in *Central Hardware* v. *N. L. R. B.*, 407 U. S. 539, and *Lloyd Corporation, Ltd.* v. *Tanner*, 407 U. S. 551. Thereafter, the Board moved the circuit court to remand the case so that the Board might reconsider the merits of the question raised in light of the two Supreme Court decisions. On November 17, 1972, the Board ordered a hearing to afford

1. 192 NLRB No. 111.

all parties an opportunity to offer evidence on the issues raised by the principles set out in the two Supreme Court decisions. On April 9, 1973, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Administrative Law Judge's Decision, the exceptions and brief, and the entire record in the case, and hereby reaffirms its earlier decision that by threatening to cause the arrests of the Charging Party's pickets, employees of the Butler Shoe Company's warehouse, while they were engaging in protected activity under Section 7 of the Act, the Respondent violated Section 8(a)(1) of the Act. While we agree with the Administrative Law Judge's recommendation that we reaffirm our earlier decision, we do so for the reasons specifically set forth in *Frank Visceglia and Vincent Visceglia, t/a Peddie Buildings*, 203 NLRB No. 27. The present case involves employee activity coming directly within the ambit of Section 7, viz. an economic strike engaged in by employees against their own employer. The striking employees were employed by Butler Shoe Company at its warehouse, which is located separately from any of its nine retail stores in the Atlanta area. They picketed their employer at each and every one of its retail stores. The employer's store in Respondent's shopping mall is not located on a public street but in a limited access location. Except for the fact that Respondent owned the property, there is no contention that Butler's employees were engaging in anything other than protected activity in picketing Butler's store.

Since the employees were engaged in what otherwise would be protected picketing, we find that their employer, whose store happens to be located within Respondent's shopping mall, was not insulated from that picketing merely because someone else, Respondent, was the technical owner of the shopping mall and the land surrounding it. In this regard, we note that Respondent's property rights in the shopping mall were not limited to its exclusive use. Indeed, to limit the mall to that use would have defeated its purpose and that of Respondent's tenants whose businesses were open to the public, as well as their employees. Clearly, it was Respondent's intent to permit use of the shopping mall to these classes of persons, and that thus Butler's employees were within the acceptable groups. That being the case, Butler's employees could not be designated as unacceptable and excluded from the mall solely because they chose to engage in protected concerted activity.

Furthermore, we are of the view that our interpretation achieves a desirable accommodation between the Respondent's property rights and the employees' Section 7 rights by according employees the right to picket their employer at such a proximate location, directly in front of the employer's premises, rather than requiring them to picket at a more distant location which may well be a common situs for entrance to other places of business and thus invite secondary effects.

ORDER

Pursuant to Section 10(c), as amended, and on the basis of the Administrative Law Judge's Decision and the entire record in this case, the National Labor Relations Board hereby reaffirms its order previously issued herein and orders that Respondent, Scott Hudgens, an Individual, Atlanta, Georgia, his officers, agents, successors, and assigns, shall take the actions set forth in the Board's previous decision.

Edward B. Miller,
Chairman

John H. Fanning,
Member

John A. Penello,
Member

(Seal) National Labor Relations Board

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SCOTT HUDGENS, An Individual and LOCAL 315, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO	Case 10—CA-8823

Administrative Law Judge's Decision

POSTURE OF THE CASE

Thomas A. Ricci, A. L. J.: Upon a stipulated statement of fact, all parties agreeing to waive a hearing before an Administrative Law Judge, the Board issued a Decision and Order in this case on August 16, 1971, finding that the Respondent, Scott Hudgens, an individual, had violated Section 8(a)(1) of the Act by restraining and coercing employees in their exercise of the rights guaranteed by Section 7 of the statute. While the case was before the United States Court of Appeals for the Fifth Circuit, in review and enforcement proceedings, the Supreme Court issued its Decisions in *Central Hardware* v. *N. L. R. B.*, 407 U. S. 539, and *Lloyd Corporation, Ltd.* v. *Tanner*, 407 U. S. 551. In order to reconsider the merits of the question raised in the light of those two decisions, the Board then moved the Circuit Court to remand the case, and on November 17, 1972, ordered a hearing to afford all parties an opportunity to offer "evidence on the issues raised by the principles set out" in the two Supreme Court decisions.

The remand hearing was held on February 1, 1973, at Atlanta, Georgia; all parties participated. Briefs were filed by the General Counsel and the Respondent.

Upon the record there made, from my observation of the witnesses, and on the basis of the record as a whole, I make the following findings of fact, recommendations and conclusions.

The question presented

Like all hearings in proceedings before the Board, this too, in the language of the remand, was ordered to receive "evidence"; this means proof of facts that may or may not shed light on questions of law that are raised. The question itself, especially in this case, remains the same. As the Board said in its original Decision:

> The sole issue in this case is whether, in the circumstances, the threat to arrest employees engaged in peaceful picketing of a business enterprise located within an enclosed mall shopping center is violative of Section 8(a)(1) of the Act.

The critical and most pertinent facts were set out plainly by agreement of the parties in their stipulation at the outset. The case involves an "enclosed mall shopping center" and the right of a union peacefully to picket a business enterprise located inside the mall. The entire property, or real estate, is owned by the Respondent, covering 55 acres of land, 60 rented stores where separate commercial tenants do business with the public, and a surrounding parking lot accommodating 2,640 automobiles. The closest public property—highways and streets bordering the privately owned land—is about 500 feet away from the enclosed structure which is the mall itself. The Union, engaged in a labor dispute with a single employer who owns and operates one of the commercial establishments inside the center—where it sells shoes, tried to picket at the entrance of the store, in the very area where the public is invited to shop at any of the many stores. Hudgens, the individual owner of the entire complex, and Respondent now, threatened to have the Union pickets arrested

for trespassing on his land. Is such a threat, based on the property right of the owner, nevertheless a violation of the National Labor Relations Act?

In concluding that Hudgens had violated Section 8(a)(1) in this situation, the Board rested the finding upon the decision of the Supreme Court in *Logan Valley*, 391 U. S. 308 (1968), where union picketing on the property of a comparable shopping center had also been held permissible. That case involved the balancing of the rights of a private property owner against the constitutional right of free speech in union representatives or employees. In 1972 the Supreme Court had occasion to pass upon the right of employees or union representatives to picket on private property in the exercise of rights flowing from congressional enactment of the NLRA, here called Section 7 of the Act: *Central Hardware Co.* v. *N. L. R. B. supra.* Now the Court said that the test of lawful union activity under the labor act, in the balancing against the right of private property, is not that enunciated in *Logan Valley* for evaluating constitutional prerogatives, but a different one. In *Central Hardware* the Court reverted back to its earlier decision in *Babcock and Wilcox,* 351 U. S. 105 (1956), where it had been ruled that private property rights need only yield to concomitant union rights where there is no other reasonable access to those persons to whom the union has a right to communicate its message, whatever it might be. In the light of these precedents, the more precise question in this case would seem to be whether, in the factual circumstances presented by a single shoe store (Butler) doing business as only one of 60 merchants in the DeKalb Mall, it can be said that other than picketing right in front of the store entrance inside the center, the Union had no other reasonable access to that segment of the public it wished, and had a right to reach. In landmark decisions there will inevitably be dicta and cross references to this or that principle of law, and the above-mentioned decisions of the Court are no different than most in this respect. In consequence many arguments and broad contentions are ad-

vanced on the basis of one juridical phrase or another, as though different cases not yet considered could be disposed of summarily without full consideration. It is important, therefore, at the outset, to remove from the gray area of confusion a number of distracting ideas, whether injected into the picture by accident or design. The air will be clarified and the case better understood if it be made clear what this case is *not* about.

(1) The object of the picketing was not to "organize"—i.e. literally to win into union membership—the employees who worked in that one shoe store inside the mall. It was instead to publicize the fact the Union was unable to convince the shoe company to a collective-bargaining agreement covering its warehouse employees who work at another location, some distance from the mall. In discussing the relative rights of real property owners against that of unions to picket, the Supreme Court, in one or two phrases appearing in *Central Hardware*, seemed to limit picketing rights to "an organizational campaign," "accommodation between organizational rights and property rights." It also said ". . . the allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' Section 7 rights." Section 7 of the Act, of course, includes the right to "assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." If the limited phrase "organizational rights" be taken in isolation and in its literal sense, it would mean that in no situation other than an attempt to persuade particular employees to join a union, need private property rights ever yield to the statutory rights of union pickets. In that event there would be an end to this case right here and now, and the complaint must be dismissed. Clearly the Court did not in that decision establish such a rule of law; and the Respondent conceded as much when it proved the Union could have flown a banner by plane over the Atlanta stadium when 56,000 spectators were cheering the football Falcons. If this be "reasonable access" to the persons the Union had a right to

reach, the audience of necessity is larger than the salesman in the one shoe store.

(2) There was nothing secondary about this picketing. The shoe company utilizes separate corporate entities for its warehouse and its retail stores; the Union represents the warehouse employees and was in process of negotiating a new contract; it does not represent the store employees, and if it did, the two groups—store as distinguished from warehouse employees—would constitute separate bargaining units. The parties stipulated that for purposes of this case store and warehouse are single employer.

(3) The pickets who were ordered away from in front of the store were employees of this single company. They were regular employees of the warehouse, then on strike. They were not strangers to the employer—such as paid outside organizers or union agents might be.

(4) The Board is not called upon to decide in this case whether the Union may picket, in the circumstances of this situation, anywhere outside the enclosed mall, out on the parking lot or on the encircling walks. The sole question is the right of employees to picket immediately in front of the Butler store in the general walking area used by the invited public at large. At one point in his testimony Douglass Ballard, manager of the Respondent landlord at the time, said that when he ordered the pickets to get out of the mall, he told them they could picket outside on the parking lot or on the distant public roads. In his earlier statement, sworn to on February 12, 1971 and attached to the signed stipulation of fact, he said he told the pickets they must go outside the entire property, or on the public roads. And three of the pickets, who also testified at the remand hearing, said this was precisely what he told them at the time of the events and no more. In defense the Respondent argues, and repeats in its brief, that the pickets could have gone out on the parking lot, and therefore had no right to

complain. Not only is this contrary to the fact (I do not credit Ballard's testimony in this respect), but the Respondent reasserts in the same brief that it has a right to eject the pickets from the parking lot area, if one day it should so choose. Whether union pickets may enter upon the privately owned parking lot of an enclosed large shopping center such as this is a question of law that will one day be decided by the Board, and not by the management of this mall or by the Respondent's attorney.

(5) Perhaps more importantly than anything else, this parking lot is not to be compared to the property and parking area belonging to a single store or plant, immediately adjacent to the work area, in front or next to it, and used exclusively by the employees or customers of a lone employer. In this parking lot—accommodating over 2600 cars—the employees of 60 employers come and go, and the entire population of greater Atlanta is invited to do business. The case which the Supreme Court considered in *Central Hardware* is therefore not precedent for what the law may be on this set of facts. Indeed, *Babcock and Wilcox,* now said to have enunciated a rule of law applicable to private property, generally, itself was only concerned with a parking lot exclusively used by the employees of one company. If leaflet distribution, or picketing, whatever the Section 7 rights being exercised by a union may at the moment be, meets the "reasonable access" test outside the parking lot of such single employer property, it does not follow that the same conclusion must be reached in the case at bar.[1]

1. Nor is the Board's decision in *Nichols of Ohio,* 200 NLRB No. 161, on which the Respondent here also relies, dispositive of this case. There there were only 5 stores fronting on a common parking lot used by the tenants, and all the property was owned by a single operator. The single tenant with whom the union was in dispute was "by far the largest building in the group." I view that case as much more akin to the single company and single parking lot situation than like an enclosed 60 store mall 500 feet away from public property.

(6) The final and most significant reality that distinguishes this case from others said to have a pertinent relationship is that the "expressive activities" of the pickets who appeared before Butler Shoe Store engaged in conduct directly related to the purposes for which the DeKalb Mall is used. The Board's Remand Order speaks of "principles set out" in *Central Hardware* and *Lloyd* v. *Tanner;* "principles" means rules of law, judicial determinations of legal issues. The issue in *Tanner,* however, was whether private property must yield to publicity activity having nothing to do with the use for which the mall or shopping center exists, and the Court made clear that it was not answering the separate and distinct question whether the property need yield to mall-related activities. The handbilling by respondents in the malls of Lloyd Center had no relation to any purpose for which the center was built and being used." *Tanner* dealt with activists generally protesting against the war in Viet Nam. And to emphasize this important distinction in the balancing of private rights against picketing rights, the Court went out of its way to distinguish its earlier decision in *Logan Valley.* In *Logan* the pickets were publicizing a labor dispute with one of the tenant retail markets, and carrying on "expressive activity" directly related to the function and purpose of the mall center, albeit the question was examined in terms of constitutional free speech rights. The Court in *Logan* had said: "We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put." 68 LRRM 2214.

The fact of the case; did the General Counsel prove there was no other means of access?

The fundamental and truly pertinent facts were set out in the parties' initial stipulation; they were not and could not be changed at the remand hearing. The public property nearest

to the Butler shoe store is about 500 feet away, at the highway intersections from which people and cars enter the parking lot that encircles the mall building. It now appears there are stop signs at three streets that reach the lot at one side, and that automobiles turning away from the 4-lane highway bordering two other entrances must slow down upon entering. As previously shown, there are four door-entrances to the mall itself, which is entirely closed at night. About 45,000 people visit the mall weekly, and they are drawn from the entire Atlanta area, including the outlying districts. The shopping center is located beyond the city limits.

The Respondent argues for dismissal of the complaint on the ground that at the remand hearing the General Counsel offered no additional testimony in support of the assertion that to exclude the union from the private property of the landlord in this case would leave it without reasonable access to that segment of the public with which it wished to communicate. The position ignores the record as a whole and misconceives the theory of complaint. The facts upon which the General Counsel relies are that Butler is only one of 60 stores fronting on the same common inside walkways for prospective customers, that the closest public area—i.e. not privately owned—is 500 feet away from the store, that a message announced orally or by picket sign at so great a distance from the focal point is too greatly diluted and dispersed, and that in consequence the inside aisles of the structure are comparable to the main streets of America. He argues that to relegate the pickets to the public highways in this case is tantamount to forcing the pickets off any public sidewalk in front of any retail store and limiting their activities to a street intersection perhaps 3 blocks away in the center of town, with 30 or 40 stores between them and the employer involved in a labor dispute.

Realistically, the Supreme Court agreed with this factual view of the case. Again and again in the *Logan Valley* case the Court spoke of the shopping mall there involved as the

General Counsel's brief speaks of the DeKalb Mall here. "The shopping center here is clearly the functional equivalent to the business district of Chickasaw involved in Marsh . . . there is no power on respondent's part to have petitioners totally denied access to the community for which the mall serves as a business district . . . the shopping center serves as the community business block 'and is freely accessible and open to the public in the area and those passing through.' "

Continuing with such realistic view of the facts, one must ask: who, or what people is it that the pickets wanted to alert to Butler's labor disputes? It is only with this question fairly answered that the ultimate *Babcock and Wilcox* test can be applied. It was not only the few immediate employees of the one small shoe store, nor was it the entire population of Atlanta and its surrounding areas. It was, instead, those members of the buying public who might, when seeing the window display of Butler's shoes inside the mall, think of doing business with that one employer. The test of reasonable access to the individual employees of one nonunion employer, as considered in both *Central Hardware* and *Babcock and Wilcox*, is therefore totally inapposite here. No more persuasive, or perhaps even relevant, is the evidence offered by the Respondent to prove what methods a merchants' association will use to advertise their combined selling activities to the public at large. The first group is too small and the second too large to fit this case. If the pickets are to be excluded from this extensive private property because the home addresses of a few store employees are available, or because they live not far away, the right to reach Butler's prospective customers would be ignored.

As to the Respondent's insistence that there were other means of communication available to the Union—existing methods for conveying its message to Butler's customers—very little that is new was offered at the hearing. It may be said that the Board had perfect knowledge of the additional facts offered by the Respondent, indeed that every court of the land today has of-

ficial notice of it all. The 60 merchants of the DeKalb Mall are organized for the purposes of acting together and sharing the cost of attracting people from all over to visit this mall. They use television commercials, radio announcements, newspaper spreads (weeklies and dailies), mass mailings and billboards (a billboard sign must normally stay up 6 months to be economically justified). There is no person throughout the broad area of Atlanta who hears or sees these messages but who is not a pinpointed object of the association's concern. Not so the people the pickets sought to reach; their audience was limited to Butler's customers, and them alone. Can it be said that because 60 merchants together find it profitable to advertise their wares on prime television time throughout the county, or to bear the cost of a professional advertising agency, these are the "reasonable" means of communication which employee pickets must use to bring attention to their labor dispute with a single shoe store in the mall? Is the Union required to squander its assets in this fashion, to dilute and dissipate its message throughout the land, because employers collectively choose to insulate their business activities behind the technically private property fence of their landlord? I think not. The proper aims of the business men are too dissimilar in scope and character to serve as restrictive parallel for the equally just objectives of union pickets.

Equally irrelevant and unpersuasive are other facts offered by the Respondent on the question of alternative reasonable access. It proved that not far away from the mall there is a post office building, a court house, a police station, public schools, and even a large incinerator. Presumably this was to show that considerable groups of people congregate at or pass near those structures, and that the pickets could have carried their message to them at those locations. The Respondent even made it a point to establish that near Atlanta there is a large Ford Motor Company plant and a Lockheed installation. Was the reasonable alternative to picketing the Butler store, where the labor

dispute centered, that the pickets could picket the entrances to Ford and Lockheed? But see Section 8(b)(4) of the Act; *Denver Building and Construction Council,* 301 U. S. 675.

There is a strong indication in Supreme Court language itself that in a shopping center of this magnitude, so much the modern day counterpart to the main streets of old, the distant public highway—500 feet away from the struck employer—is too far away if the pickets are not to be denied their lawful right under Section 7 of the Act to bring their proper message to Butler's customers. The public roads were from 350 to 500 feet away in the shopping center considered in *Logan Valley,* and there were only 15 stores as yet opened and doing business at that time. The Court stressed the difficulty of conveying a message from the public roadway to the particular customers of a single store among the many in that case, and even the possible danger of the picket at the public roads. The significant part of the decision was that the message was properly intended for a limited group among the great many members of the public who of necessity were invited to visit the large group of merchants.

Clearly the test now to be applied to the case at bar is that set out in *Babcock and Wilcox*. Has the General Counsel proved the Union had no other reasonable access to Butler's customers coming to the DeKalb shopping center? I think the answer, based upon the record as a whole, must be yes. Exclusion of the pickets to the distant highways would mean denial of the union's recognized right to bring a psychological pressure upon persons doing business with the struck employer, customers and employees alike. With the efficacy of the tactic decreasing markedly as the locus of the action is removed from the employer's place of business, it cannot be fairly said that picketing at the highways bordering the entire DeKalb mall is a reasonable alternative to picketing the shop or store premises itself.

Recommendation

There is no sufficient reason on the basis of the expanded record as now made for the Board to depart from its conclusion of law reached in the original decision. I therefore recommend that it reaffirm that finding and adhere to the remedial order issued there.

/s/ THOMAS A. RICCI
Thomas A. Ricci
Administrative Law Judge

Dated at Washington, D. C., April 9, 1973.

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SCOTT HUDGENS, An Individual and LOCAL 315, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO	Case 10—CA-8823

DECISION AND ORDER

Upon charges filed by the Charging Party, Local 315, on January 25, 1971, the General Counsel of the National Labor Relations Board by the Regional Director for Region 10 issued a complaint and notice of hearing on February 24, 1971, against Respondent, Scott Hudgens. The complaint alleges in substance that Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the National Labor Relations Act, as amended. In its duly filed answer, the Respondent admits certain allegations of the complaint, denies all unfair practice allegations, and avers lack of information and belief as to certain other allegations.

On March 24, 1971, the parties, including the General Counsel, entered into a stipulation in which, *inter alia*, they requested that this proceeding be transferred to the Board. In the stipulation the parties agreed in effect that the formal papers filed in this proceeding, the stipulation, together with the attached exhibits, and the Order Postponing Hearing Indefinitely would constitute the entire record in the case and agreed that no oral testimony was necessary or desired. They waived their right to a hearing before a Trial Examiner, the making of findings of

fact and conclusions of law by a Trial Examiner, and the issuance of a Trial Examiner's Decision. The stipulation provided for the filing of briefs with the Board.

On March 25, 1971, the Regional Director issued an Order Postponing Hearing Indefinitely. On March 30, 1971, the Board issued its Order Granting Motion Approving Stipulation and Transferring Proceedings to the Board. Respondent and the General Counsel filed briefs thereafter.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the entire record in this case, including the briefs of the General Counsel and the Respondent, and makes the following:

Findings of Fact

I. The Business of the Respondent

The Respondent is, and has been at all times material herein, an individual employer, with an office and place of business located in Atlanta, Georgia, where he is engaged in the selling and leasing of real estate and the development of property in the State of Georgia. Respondent, during the past calendar year, which period is representative of all times material herein, received gross revenue in excess of $100,000 from leases for floor space with tenants in the North DeKalb Shopping Center, Decatur, Georgia. During the same period and pursuant to the aforesaid leases, Respondent received gross revenue in excess of $25,000 from tenants, including F. W. Woolworth Company and Butler Shoe Company, some of whom annually have a gross volume of business in excess of $500,000 and purchase and receive products valued in excess of $50,000 directly from suppliers located outside the State of Georgia. Accordingly, we

find that the Respondent is and has been at all times material an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction in this proceeding.

II. The Labor Organization Involved

The parties agree and we find that Local 315, Retail, Wholesale & Department Store Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The North DeKalb Shopping Center is located at Lawrenceville Highway and North Druid Hills Road in DeKalb County, Georgia. There are three entrance roads into the center, one from Lawrenceville Highway and two from North Druid Hills Road. Between the shopping center complex and the entrances from North Druid Hills Road and Lawrenceville Highway there is a parking area with parking spaces and driveways lined off thereon. The shopping center complex is completely surrounded by parking facilities.

There are approximately 60 stores in the center. The shopping center complex has an enclosed mall with four primary entrances, each approximately 20 feet in width with six or eight swinging doors on each. Some of the stores at the center have entrances only to the parking lot and cannot be reached via the enclosed mall and cannot be reached directly from the parking area, while a few stores have entrances from both the enclosed mall and the parking area. Butler Shoe Company's retail store can be entered only from the enclosed mall. Eighty-five to 90 percent of the customers who shop at those stores which have entrances only from the mall enter the shopping center complex through one of the four primary entrances.

On or about January 22, 1971, at or about 9:30 a.m., four employees of Butler Shoe Warehouse, located at 204 Brook-

wood Drive, N. E., Atlanta, Georgia, appeared in the North DeKalb Shopping Center mall with picket signs reading, "Butler Shoe Warehouse on Strike, AFL-CIO, Local 315." These pickets were sitting on a bench, inside the mall area, near the Butler Shoe Store waiting for the store to open. Respondent's general manager, Douglas C. Ballard, a supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent, approached the pickets and told them that picketing was not permitted in the enclosed mall and, if they did not leave, they would be arrested. The pickets left but returned within the hour and began picketing with their signs in front of the entrances to Butler Shoe Store in the mall corridors. Picketing continued for about 30 minutes when a picket was called to a phone and told by Manager Ballard that the pickets would have to leave. According to the picket, Ballard said that if they did not stop picketing he would have the police out there in 30 minutes and have them locked up. Ballard, however, did not recall telling the picket on the phone that he would have them arrested.

Also, on January 22, 1971, Respondent's attorney stated to the Charging Party's attorney that the picketing could not be permitted within the enclosed mall and that if the pickets did not leave, after being requested to do so, the Respondent would call the DeKalb County Police and obtain warrants for their arrest for criminal trespass. Thereafter, the pickets left the premises.

The sole issue in this case is whether, in the circumstances, the threat to arrest employees engaged in peaceful picketing of a business enterprise located within an enclosed mall shopping center is violative of Section 8(a)(1) of the Act.

The General Counsel contends that the above issue has been resolved by the Supreme Court in *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968), wherein the Court held that an injunction

by state court prohibiting, on grounds of trespass, picketing of a nonunion supermarket located in a shopping center violated the pickets' right of free speech. The Court relied on the circumstances that the shopping center served as a community business block and was open and accessible to the people in the shopping area as well as those passing through. The fact that the property was privately owned, rather than consisting of a public street and ways was not in the Court's view sufficient to justify restrictions on the place of picketing. The General Counsel further contends, relying on *Priced-Less Discount Foods Inc. d/b/a Payless,* 162 NLRB 872, that since the place of picketing was legal, and since the picketing is protected as a concerted activity under Section 7 of the Act, the threat to arrest the pickets for engaging in a protected concerted activity is violative of Section 8(a)(1) of the Act.

Respondent would distinguish the present case from *Logan Valley* on grounds that an enclosed mall shopping center is not analogous to a community business block but is rather analogous to the various departments within a store, and on the further ground that whereas in *Logan Valley* the picketing could be conducted only in the shopping center or adjacent to the public highway, here the pickets had a right to utilize the parking areas and sidewalks surrounding the enclosed mall. The record establishes, however, that Manager Ballard told the pickets they would have to picket on North Druid Hills Road or Lawrenceville Highway.

On the stipulated record, we find no evidence indicating that the enclosed mall is not generally open to public access during normal business hours when the picketing occurred. We further find that there is no evidence that the picketing involved herein unduly interfered with the normal use of the mall by either the Respondent, its lessees, or other members of the public. We also find that the picketing was peaceful and in conjunction with a labor dispute and therefore was protected

activity within the meaning of Section 7 of the Act. In these circumstances, we find that *Logan Valley* establishes the Union's right to picket at the location it chose, and that the Respondent's threats to cause the arrest of the pickets for criminal trespass if they continued to refuse to leave the enclosed mall unlawfully interfered with protected concerted activities, in violation of Section 8(a)(1) of the Act.

Conclusions of Law

1. Scott Hudgens, an Individual, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 315, Retail, Wholesale & Department Store Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to cause the arrest of the Charging Party's pickets, employees of Butler Shoe Company's warehouse, while they were engaging in protected activity under Section 7 of the Act, the Respondent violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Effect of the Unfair Labor Practice Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the Respondent violated Section 8(a)(1) of the Act, we shall order that it cease and desist therefrom and that it takes certain affirmative action which will effectuate the policies of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Scott Hudgens, an Individual, his agents, successors, and assigns, shall:

1. Cease and desist from threatening to cause the arrest of any union members while peacefully picketing as part of protected concerted activity within the enclosed mall area of Respondent's shopping center, or in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection; and to refrain from any and all such activities.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Post at his office and other conspicuous places in the North DeKalb Shopping Center copies of the attached notice marked "Appendix."[1] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent, or his authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be main-

1. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., August 16, 1971.

John H. Fanning,
Member

Gerald A. Brown,
Member

Howard Jenkins Jr.,
Member

(Seal)

National Labor Relations Board

Supreme Court, U. S.
FILED
MAY 15 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-773

SCOTT HUDGENS, AN INDIVIDUAL,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,
Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 20, 1974
CERTIORARI GRANTED MARCH 17, 1975.

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-773

SCOTT HUDGENS, AN INDIVIDUAL,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,
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CERTIORARI GRANTED MARCH 17, 1975.

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APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Scott Hudgens, an Individual

Case No.: 10-CA-8823

1/25/71	Charge filed.
2/24/71	Complaint and Notice of Hearing, dated.
3/ 4/71	Petitioner's Answer to Complaint, dated.
3/24/71	Motion to Transfer Case to the Board, dated.
3/24/71	Stipulation entered into by all parties, dated.
3/25/71	Regional Director's Order Postponing Hearing Indefinitely, dated.
3/30/71	Board's Order Granting Motion, Approving Stipulation and Transferring Proceeding to Itself, dated.
8/16/71	Decision and Order issued by the National Labor Relations Board, dated.
9/17/71	Union's Motion in Opposition to Petitioner's Motion for the Board to Reconsider its Decision and Order, received.
10/ 1/71	Petitioner's Motion for Reconsideration, received.
10/12/71	General Counsel's telegram opposing Petitioner's Motion for Reconsideration, received.
10/19/71	Board's Order Denying Motions, dated.
10/21/71	Petition for Review filed by Petitioner.
7/17/72	Court of Appeals remands for reconsideration.
9/13/72	Petitioner's Motion to Remand to an Administrative Law Judge, dated.

9/28/72	Board's telegraphic order advising the Board will not rule on Motion to Remand until all parties have submitted statement of position, dated.
9/29/72	Petitioner's Offer of Proof in Support of Motion to Remand.
10/20/72	General Counsel's Statement of Position, received.
10/20/72	Petitioner's Statement of Position, received.
11/ 1/72	Petitioner's Reply to General Counsel's Statement of Position, received.
11/17/72	Order Remanding Proceeding to Administrative Law Judge, dated.
11/27/72	Notice of Hearing, dated.
12/ 7/72	Order Rescheduling Hearing, dated.
2/ 1/73	Hearing opened.
2/ 1/73	Hearing closed.
4/ 9/73	Administrative Law Judge's Decision, issued.
5/25/73	Petitioner's Exceptions to Administrative Law Judge's Decision, received.
8/21/73	Board's Supplemental Decision and Order, issued.
9/21/73	Petition to Review filed in Court of Appeals.
9/25/74	Decision of Court of Appeals Issues.
10/18/74	Judgment of Court of Appeals Issues.
11/11/74	Mandate Issues.
12/20/74	Petition for Writ of Certiorari filed.
3/17/75	Certiorari granted.

CHARGE AGAINST EMPLOYER

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

	Do Not Write in This Space
Instructions: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.	Case No. 10-CA-8823
	Date Filed 1-25-71

1. Employer Against Whom Charge Is Brought

a. Name of Employer: Scott Hudgens, an Individual

b. Number of Workers Employed: Approximately 50

c. Address of Establishment (Street and number, city, State, and ZIP code)
P. O. Box 20767, Atlanta, Georgia 30320

d. Employer Representative to Contact
Dock H. Davis, Attorney at Law

e. Phone No. 762-9663

f. Type of Establishment (Factory, mine, wholesaler, etc.)
Realtor

g. Identify Principal Product or Service
Leasing and renting space in shopping centers

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsection (1) and ..... (List subsections)

of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basic of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

The above named Scott Hudgens, did on or about January 22, 1971, at the North DeKalb Shopping Center, DeKalb County, Georgia, interfere with, restrain and coerce the employees of Butler's Shoe Corp. in the exercise of their rights as guaranteed under Section 7 of the Act, as amended.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge, (If labor organization, give full name, including local name and number)

Local 315, Retail, Wholesale & Department Store Union, AFL-CIO

4a. Address (Street and number, city, State, and ZIP code)
1838 Stewart Ave., S. E. Atlanta, Georgia 30315

4b. Telephone No. 758-6865

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

American Federation of Labor and Congress of Industrial Organizations

6. Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By Morgan C. Stanford Attorney
(Signature of representative or person filing charge) (Title, if any)

Address 6th Floor—Rhodes-Haverly Bldg.
Atlanta, George 30303 523-2825 January 22, 1971
(Telephone number) (Date)

Wilfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 1001).

BEFORE THE NATIONAL LABOR RELATIONS BOARD

* * (Caption—10-CA-8823) * *

COMPLAINT AND NOTICE OF HEARING

It having been charged by Local 315, Retail, Wholesale & Department Store Union, AFL-CIO, herein called the Union, that Scott Hudgens, an Individual, herein called Respondent, has engaged in, and is engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U. S. C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director, issues this Complaint and Notice of Hearing Pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended.

1

A copy of the charge, filed on January 25, 1971, was served upon Respondent by registered mail on January 25, 1971.

2

Respondent is, and has been at all times material herein, an individual employer, with an office and place of business located at Atlanta, Georgia, where he is engaged in the selling and leasing of real estate and the development of property in the State of Georgia.

3

Respondent, during the past calendar year, which period is representative of all times material herein, received gross revenue in excess of $100,000 from leases for floor space with tenants in the North DeKalb Shopping Center, Decatur, Georgia. During this same period and pursuant to the aforesaid leases,

6

Respondent received gross revenue in excess of $25,000 from tenants, including F. W. Woolworth Company, Butler Shoe Company and Rich's Inc., each of whom annually has a gross volume of business in excess of $500,000 and purchases and receives products valued in excess of $50,000 directly from suppliers located outside the State of Georgia.

4

Respondent is, and has been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

5

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

6

General Manager, Douglas C. Ballard, is, and has been at all times material herein, a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent.

7

Respondent, by its supervisor and agent, General Manager Douglas C. Ballard, on or about January 22, 1971, in and about the vicinity of Respondent's North DeKalb Shopping Center, threatened employees of Butler Shoe Company with arrest if they engaged in, or continued to engage in, picketing on behalf of the Union at the shopping center.

8

The acts of Respondent alleged in paragraph 7 above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

7

Please Take Notice on the 31st day of March, 1971, at 10:00 a.m., Eastern Standard Time, in Room 710, 730 Peachtree Street, N. E., Atlanta, Georgia, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Summary of Standard Procedures in Formal Hearings held before the National Labor Relations Board in Unfair Labor Practice Cases as taken from the Board's published Rules and Regulations and Statements of Procedure, is attached.

You are Further Notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and 4 copies of an answer to said complaint within 10 days from the service thereof and that unless it does so all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated at Atlanta, Georgia, this 24th day of February, 1971.

/s/ WALTER C. PHILLIPS
Walter C. Phillips
Regional Director
National Labor Relations Board
Room 701, 730 Peachtree Street, N. E.
Atlanta, Georgia 30308

BEFORE THE NATIONAL LABOR RELATIONS BOARD

* * (Caption—10-CA-8823) * *

ANSWER OF RESPONDENT

In response to the Union's Complaint, Respondent answers as follows:

1

Respondent admits the allegations contained in Paragraph One.

2

Respondent admits the allegations contained in Paragraph Two.

3

Respondent admits the allegations contained in Paragraph Three, except that it denies that it has received any gross revenue from Rich's, Inc.

4

Respondent admits the allegation contained in Paragraph Four.

5

Due to lack of information and belief, the respondent neither admits nor denies the allegations contained in Paragraph Five.

6

Respondent admits the allegations contained in Paragraph Six.

7

Respondent denies the allegations of Paragraph Seven, except that Respondent does admit that General Manager, Douglas C. Ballard threatened to call the police if the picketers did

not cease picketing within the enclosed mall at the shopping center.

8

Respondent denies the allegations contained in Paragraph Eight.

Dated at Atlanta, Georgia, this 4th day of March, 1971.

Respectfully submitted,

DOCK H. DAVIS
Attorney of Law
Scott Hudgens Building, 3rd Floor
P. O. Box 45031—Atlanta, Georgia 30320
Phone—762-8663

BEFORE THE NATIONAL LABOR RELATIONS BOARD

* * (Caption—10-CA-8823) * *

STIPULATION

It Is Hereby Stipulated and Agreed by and among Scott Hudgens, an individual (herein called Respondent), Local 315, Retail, Wholesale, & Department Store Union, AFL-CIO (herein called Union), and the Counsel for the General Counsel of the National Labor Relations Board (herein called the Board), that:

1

The General Counsel of the Board, by the Regional Director for the Tenth Region, acting pursuant to authority granted in Section 10(b) of the National Labor Relations Act, as amended, 29 U. S. C. Sec. 151, *et seq.* (herein called the Act), and pursuant to Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, issued a Complaint and Notice of Hearing dated February 24, 1971, against Respondent upon charges filed January 25, 1971. True copy of said charge was served upon Respondent by registered mail on January 25, 1971. True copies of said Complaint and Notices of Hearing were served by registered mail upon Respondent and upon Union, the Charging Party herein.

2

Respondent is, and has been at all times material herein, an individual employer, with an office and place of business located at Atlanta, Georgia, where it is engaged in the selling and leasing of real estate and the development of property in the State of Georgia.

3

Respondent, during the past calendar year, which period is representative of all times material herein, received gross revenue

in excess of $100,000 from leases for floor space with tenants in the North DeKalb Shopping Center, Decatur, Georgia. During this same period and pursuant to the aforesaid leases, Respondent received gross revenue in excess of $25,000 from tenants, including F. W. Woolworth Company and Butler Shoe Company, some of whom annually have a gross volume of business in excess of $500,000 and purchase and receive products valued in excess of $50,000 directly from suppliers located outside the State of Georgia.

4

Respondent is, and has been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

5

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

6

General Manager, Douglas C. Ballard, is, and has been at all times material herein, a supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent.

7

The North DeKalb Shopping Center is located at Lawrenceville Highway and North Druid Hills Road in DeKalb County, Georgia. There are three entrance roads into the center, one from Lawrenceville Highway and two from North Druid Hills Road. There are approximately 60 stores in the center. The shopping center complex has an enclosed mall with four entrances approximately 20 feet in width with six or eight swinging doors on each. Some of the stores at the center have entrances only to the parking lot and cannot be reached via the enclosed mall, others have entrances only from the enclosed mall and cannot be reached directly from the parking area, while a few stores

have entrances from the enclosed mall and from the parking area. Butler Shoe Company's retail store can be entered only from the enclosed mall. Eighty-five to ninety percent of the customers who shop at those stores which have entrances only from the mall enter the shopping center complex through one of the four primary entrances.

Between the shopping center complex and the entrances from North Druid Hills Road and Lawrenceville Highways there is a parking area with parking spaces and driveways lined off thereon. The shopping center complex is completely surrounded by its parking facilities. A diagram showing the Butler Shoe Store in the Mall and the position where the picketing occurred is attached hereto as Exhibit 1. Exhibit 2, also attached hereto, is a diagram showing the arrangement of the enclosed mall and the retail stores.

8

On or about January 22, 1971, at about 9:30 a.m., four employees of Butler Shoe Warehouse located at 204 Brookwood Drive, N. E. Atlanta, Georgia, appeared in the North DeKalb Shopping Center Mall with picket signs reading "Butler Shoe Warehouse on Strike, AFL-CIO, Local 315." These pickets were sitting on a bench, inside the mall area, near the Butler Shoe Store waiting for the store to open. Respondent's General Manager, Douglas C. Ballard, approached the pickets and told them that picketing was not permitted in the enclosed mall and, if they did not leave, they would be arrested. The pickets left but returned within the hour and began picketing in front of the entrances to the Butler Shoe Store in the mall corridors with their picket signs. Picketing continued for about 30 minutes when a picket was called to a phone and talked with Manager Ballard. According to the picket, Ballard said that they would have to leave and if they did not stop picketing he would have the police out there in 30 minutes and have them locked up. Copy of picket's statement (Roger L. Long) attached hereto as Exhibit 3. According to Ballard, he does not recall telling the

picket on the phone that he would have them arrested. Copy of Ballard's statement is attached hereto as Exhibit 4.

9

Also, on January 22, 1971, Morgan C. Stanford, attorney for the Charging Party, after he was advised that the shopping center had ordered the pickets to cease their picketing in front of Butler's Shoe Store, telephoned Dock H. Davis, attorney for Scott Hudgens. Stanford stated to Davis that in his opinion the Union had a right to picket inside the enclosed mall and that he would have to check with the Union before he could advise them to discontinue their picketing activity. Davis stated to Stanford that the pickets could not be permitted within the enclosed mall and that if they did not leave, after being requested to do so, the Lessor would call the DeKalb County Police and obtain warrants for their arrest for criminal trespass if they continued to refuse to leave the enclosed mall.

10

This Stipulation, together with the Charge, Complaint and Notice of Hearing, Answer of Respondent, and Order Indefinitely Postponing Hearing will constitute the entire record herein.

11

In order to effectuate the purposes of the Act and to avoid unnecessary costs and delay, the parties hereto expressly waive a hearing before a Trial Examiner, the making of findings of fact and conclusions of law by a Trial Examiner, and the issuance of a Trial Examiner's Decision; and agree that, in lieu thereof, this case shall proceed and be transmitted directly to the Board in Washington, D. C., for findings of fact, conclusions of law, and the entry of an appropriate Order by the Board pursuant to the provisions of the Act, and further agree that this Stipulation and the entire record herein as set forth in Paragraph 10 above shall be filed with the Board in Washington, D. C., and that the

Board may proceed to make such findings of fact, conclusions of law, and enter such order pursuant to the provisions of the Act based upon this Stipulation and the entire record herein, without further notice. The parties expressly waive all further hearings, taking of testimony, submission of evidence, oral argument, filing of exceptions, or other procedure before the Board and any member thereof; provided, however, that the parties may file briefs with the Board on or before May 10, 1971, or within such time as the Board may provide.

12

This Stipulation contains the entire agreement of the parties, there being no other agreement of any kind, verbal or otherwise, express or implied, which varies, alters, or adds to this Stipulation; provided, however, that this Stipulation is made without prejudice to any objection that any party may have as to the relevancy, materiality, or competency of any facts stated herein.

In Witness Whereof the undersigned have hereunto set our hands on the dates and at the place written opposite our respective names.

Scott Hudgens, an Individual
By /s/ DOCK H. DAVIS
Attorney at Law

Signed this 24th day of March, 1972 at Atlanta, Georgia.

LOCAL 315, RETAIL, WHOLESALE & DEPARTMENT STORE UNION, CIO
By /s/ MORGAN C. STANFORD
Attorney

Signed this 24th day of March, 1971 at Atlanta, Georgia.

Counsel for The General Counsel
By /s/ SILVIA L. MASCOTTI
Attorney

Signed this 24th day of March, 1971 at Atlanta, Georgia.

Exhibit 1 to Stipulation

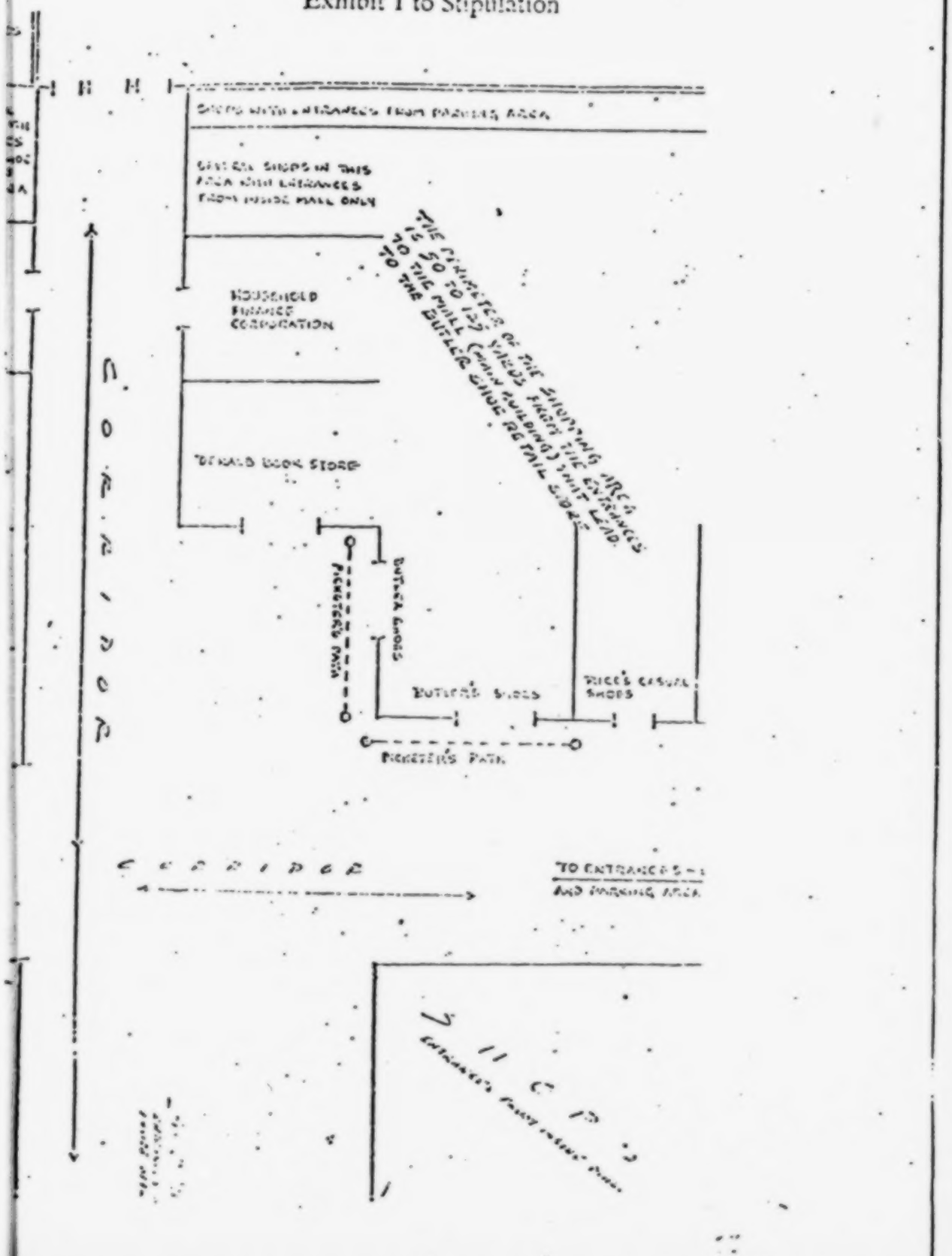
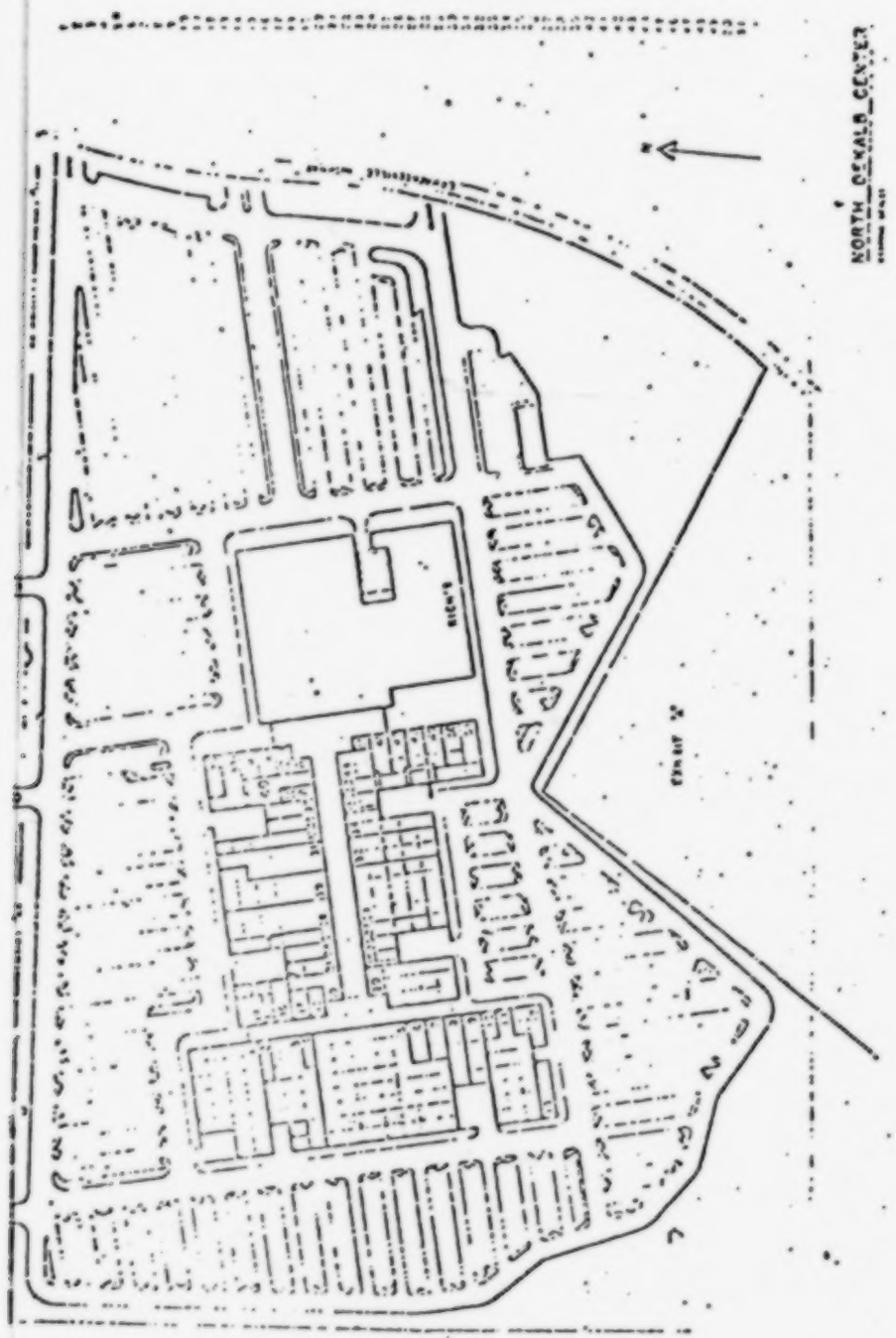


Exhibit 2 to Stipulation



5:1

EXHIBIT 3

TO STIPULATION

STATE OF GEORGIA
COUNTY OF FULTON

I, Roger L. Long, residing at 273 Fletcher Street, S. W., Atlanta, Georgia, being duly sworn state:

My telephone number is 753-1942. I am employed by Butler Shoe Company in the Warehouse at 204 Brookwood Drive, N. E. Atlanta, Georgia. I am employed as a selector. I do not have any supervisory authority. I do not have any employee working under my supervision. I am a member of the Retail Clerks Union.

I am a member of the Retail Clerks Bargaining Committee with Butler Shoe Company. On January 22, 1971 at about 11:00 AM I went out to the North DeKalb Shopping Center along with one other colored employee of the Butler Shoe Warehouse to picket the Butler Shoe Store in the Mall shopping Center. Ronnie Holmes, Harold Glenn, Tyronne Taylor and DeWitt Freeman had been picketing this store earlier in the morning and were told that they were not allowed to picket. They called the union hall and that is the reason I and this other employee, Charles Todd, went out to the shopping center to picket. We met the other four men near the Butler Shoe Store in the Mall. Three men began picketing in front of the Butler Shoe Store in the Mall Shopping Center with picket signs reading "On Strike, Butler Shoe Company, AFL-CIO" or words to that effect. The picketing continued for about thirty minutes. Picketing was peaceful.

About 11:30 AM the building attendant came to me and told me that there was a telephone call for me. I went to the phone and a man by the name Doug Ballard told me that he had talked to some negro pickets earlier that morning and told them that

they could not picket in the Mall building and that if we did not stop picketing that he would have the police out there in about 30 minutes to lock us up. He said that we could stay but the signs would have to go. I told him that we had received word from our lawyer that it was O.K. to picket in the building and the best thing I know is to call our lawyer, Mr. Stanford, to get the matter straighten out, and that I would call him afterwards to find out what to do. Mr. Ballard said alright.

I called Mr. Stanford's office and he was on the phone and I was told to hold on. When Mr. Sanford talked to me on the phone he tried to explain to me something about the sliding doors at the mall and told me that maybe it would be best if we came in to the union hall. I then instructed the men to come on back to the union hall. The Mall is covered and has doors on the entrances. There are a number of other stores in the Mall other than Butler Shoe.

The strike ended on or about Jan. 27, 1971.

I have read the above and swear it is true and correct.

/s/ ROGER L. LONG

Signed and sworn to before me this 11th day of Feb. 1971.

/s/ S. L. MASCOTTI
S. L. Mascotti, *Attorney*
National Labor Relations Board

EXHIBIT 4

TO STIPULATION

STATE OF GEORGIA
COUNTY OF FULTON

I, Douglas C. Ballard, being duly sworn state:

I am General Manager of North DeKalb Shopping Center which is owned and operated by D. Scott Hudgens, Jr. There are sixty (60) retail stores in the DeKalb Shopping Center and one of these is the Butler Shoe Store. Scott Hudgens, Jr., is in the Real Estate and Development Business in the state of Georgia.

On or about January 22, 1971 at about 9:00 A.M. I noticed that there were four or five persons sitting on a bench with picket sings waiting for the Butler Shoe Store to open. They were sitting close to the Butler Shoe Store. I told these pickets that they were not going to picket our mall. If you want to picket you will have to be outside. I sympathize with your problem but the malls' primary purpose is for shoppers to shop in stores. If you don't leave I'll have you arrested. I told them that they would have to picket in North Druid Hills Road or Lawrenceville Highway. Later in the morning our lawyer, Dock Heard Davis told them that they could picket on the sidewalks to the mall I talked to the pickets on the telephone and told them once again that they would have to leave. I do not recall whether I told them that I would have them arrested.

I have read the above and swear it is true and correct.

/s/ DOUGLAS C. BALLARD
Douglas C. Ballard

Signed and sworn to before me this 12th day of February, 1971.

/s/ S. L. MASCOTTI
S. L. Mascotti, Attorney
National Labor Relations Board

BEFORE THE NATIONAL LABOR RELATIONS BOARD
* * (Caption—10-CA-8823) * *

ORDER GRANTING MOTION, APPROVING STIPULATION AND TRANSFERRING PROCEEDING TO THE BOARD

On March 29, 1971, Scott Hudgens, an Individual, Local 315, Retail, Wholesale & Department Store Union, AFL-CIO, and the General Counsel of the National Labor Relations Board, filed with the Board a joint Motion to Transfer Case to the Board, and a Stipulation entered into by the parties on March 24, 1971. The parties stipulated to certain facts and agreed that certain formal papers and the Stipulation constitute the entire record in the case. They waived a hearing before a Trial Examiner, the making of findings of fact and conclusions of law by a Trial Examiner, and the issuance of a Trial Examiner's Decision and agreed that, in lieu thereof this case shall be proceed and be transmitted directly to the Board in Washington, D. C., for findings of fact, conclusions of law, and the entry of an appropriate Order by the Board. They expressly waived all further hearings, taking of testimony, submission of evidence, oral argument, filing of exceptions, or other procedure before the Board; provided, however, that the parties may file briefs with the Board on or before May 10, 1971, or within such time as the Board may provide.

The Board having duly considered the matter,

It Is Hereby Ordered that the Motion to Transfer Case to the Board be, and it hereby is, granted, and that the above-entitled proceeding be, and it hereby is, transferred to and continued before the Board in Washington, D. C., for the purpose of making findings of fact and conclusions of law and for the issuance of a Decision and Order.

It Is Further Ordered that the Stipulation be, and it hereby is, approved and made a part of the record herein.

The parties herein may file briefs with the Board in Washington, D. C., on or before May 10, 1971.

Dated, Washington D. C., March 30, 1971.

By direction of the Board:

GEORGE A. LEET,
Associate Executive Secretary.

BEFORE THE NATIONAL LABOR RELATIONS BOARD
* * (Caption—10-CA-8823) * *

RESPONDENTS MOTION FOR RECONSIDERATION

Scott Hudgens, Respondent herein, by his attorneys, repectfully moves, pursuant to Section 102.48(d) of the Rules and Regulations of the National Labor Relations Board, that the Board *en banc* reconsider the panel decision and order of August 16, 1971 (hereinafter referred to as the "panel decision") entered in the above captioned matter, after granting Respondent an opportunity to present oral argument to the Board *en banc*, for the extraordinary circumstances described below.[1] The instant case is one of paramount national concern which warrants careful reconsideration, after oral argument, by a fully-constituted National Labor Relations Board.

Introductory Statement

The panel decision is based on the misconception that the only rights hereinvolved are those set forth in Section 7 of the Act. There is, however, as recent Board decisions have made clear,[2] another, and in this case over-riding, interest. A property owner has a Constitutional right to prevent his private commerical property from being confiscated without just compensation. This right, as the Supreme Court observed in *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 112 (1956), flows from the same authority, the National Government, that grants employees organizational rights. Where, as here, a union has effective alternative means for exercising its Section 7 rights, a property owner cannot be compelled to subsidize such a competing use of his property. Yet this is the result of the panel decision—the Respondent is required to provide, free of charge, its valuable commercial facilities to be utilized in a manner that will distract and even drive away those very customers it has attracted to the North DeKalb Shopping Center. This significant confiscation of Respondent's property, as shown below, is neither required by *Babcock & Wilcox* or *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308 (1968), nor constitutes a permissible erosion on the doctrine of abstention.

1. The instant case amply meets all of the criteria described by Chairman Miller in his address to the Labor Law Section of the American Bar Association, as reported at 74 LRR 348 (August 17, 1970). It is a case of widespread general importance and interest to employers throughout the country. The issues involved are novel and significant ones which have not been previously resolved by the Board. And finally, the Union's conduct here is not unique; it is likely to be repeated time and again by numerous unions at numerous shopping centers for numerous varied purposes.

2. *Monogram Models, Inc.*, 192 NLRB No. 99 (Aug. 18, 1971); *New Pines, Inc.*, 191 NLRB No. 144 (July 8, 1971); *The Falk Corporation*, 192 NLRB No. 100 (Aug. 18, 1971); and *Scholle Chemical Corp.*, 192 NLRB No. 101 (August 18, 1971).

Statement of Facts

The panel decision gives short shrift to both of the critical elements in this case: the situs of the Union's activities and the alternative channels of communication were available. This is a fundamental defect; by failing to appreciate either the nature of the North DeKalb Shopping Center or the effective alternative means of communication that were available, the panel disregarded the need to accommodate the competing interests here involved.

1. *The Nature of the North DeKalb Shopping Center*

The North DeKalb Shopping Center is a private shopping center.[3] Respondent has made a substantial, continuing investment in the Center in order to attract potential customers to, and encourage them to do business with, the establishments maintained there. There is a large parking area provided for

3. The Center is clearly marked and preserved as private property. Each night, for example, the interior mall area is locked and access denied the public. The Center is also protected by a security guard which regularly patrols the area.

customers only and a totally covered shopping mall containing approximately sixty tenant stores. A continuous expenditure is required for advertising, an extensive inventory of quality merchandise and business promotions and displays to induce prospective customers to come to the Center. A considerable investment is also necessary so that, once having been attracted to the Center, potential purchasers will fully utilize its various shopping facilities; the Center must be considered as a pleasant, conducive place to shop without disruption and interference. It is for this reason that the mall area is designed to be virtually indistinguishable from the selling areas of the stores[4] and shoppers there provided with controlled temperatures, piped-in music, restroom facilities and benches and receptacles placed on an attractive common aisleway. It is for this reason also that Respondent and the tenant stores expend substantial sums annually to provide the varied services, such as security, maintenance, insurance, utilities, air conditioning, taxes and licenses, and so on, necessary to operate the common areas of the Center.

Since the sole purpose of Respondent's substantial investment in the Center is to obtain and preserve the patronage of the public, all activity on Center premises which does not directly promote its commercial purposes is forbidden. This prohibition is one which applies with equal force to both Respondent, its tenants and strangers alike.[5] The restriction is one enforced without discrimination. Non-commercial conduct is barred

4. The tenant stores have an unobstructed frontage on, and their displays and merchandise are easily visible from, the mall common aisleways. There are also three kiosks or leased mall sales booths actually located in the middle of the aisleway. One of these kiosks was located within 10 or 15 feet of the points shown on Exhibit 1 of the Stipulation where the pickets' paths stop at the corner of the Butler store.

5. As a specific condition of the tenant agreements with Respondent, under which Respondent receives a percentage of the tenant sales, it is agreed that all non-promotional activity on the mall common areas is prohibited. This condition is strictly enforced with one exception. An unrented and available kiosk or booth may be provided, upon advance reservation, for certain specific non-Center activities. Here, however, the Union made no attempt to seek the use of this location.

because it would unavoidably disrupt and distract shoppers, and appropriate their limited purchasing time, with matters unrelated to Center business. It would both burden the facilities of the Center and detract from its sales. As a result, although the Center is besieged with many calls each week from various groups seeking to use the mall common aisleways for a multitude of reasons, all such conduct has been uniformly prohibited.

2. *The Effective Alternative Means of Communication Available*

The panel decision seriously distorts the record in assuming that, if the Union could not picket within the enclosed mall, the pickets "would have to picket on North Druid Hills Road or Lawrenceville Highway." Sl. Op., p. 6. While such a statement may have initially been made, the Union clearly understood that the Respondent did not, in fact, contest the right to picket *anywhere* except upon the commercial area of the mall common aisleways. This was the *only* situs which Union picket Long understood picketing would not be allowed (Stip. Exh. 3); the *only* place that Respondent's attorney Davis informed Union attorney Standford where pickets would be requested to leave (Stip., par. 9); and the *only* situs which the Respondent contended in its brief that picketing would be impermissible. As stated in that brief, the public may use either the "sidewalks in the parking areas or along the outer perimeter of the building . . . for various purposes, *including picketing*, provided there is no unreasonable interference or hindrance to those persons wishing to enter and shop at any of the stores located inside . . . There is no question that the Local 315 pickets have a right to utilize the parking areas and sidewalks, *and they were invited to do so* . . . " Resp. Br., pp. 2, 4 (emphasis added).

This salient fact is significantly omitted from the panel decision. The panel thus failed to recognize that the Union's objective could have effectively been achieved at other locations than the interior of the mall. Eighty-five to ninety percent of the

Butler customers entered through one of the four entrances to the enclosed mall. Stip., par. 7. By stationing a picket at each of those entrances there would have manifestly been a full communication of the Union's message.[6] Here, as in *Babcock & Wilcox*, other means for the exercise of the Union's Section 7 rights were clearly available. And in contrast to Logan Valley, there was no "substantial hind[rance] to the communication of the ideas which [the Union] seeks to express." 391 U. S. at 323. The alternative available was not inefficient and hazardous berms 350 to 500 feet distant but safe and effective locations 50 to 125 yards *inside* Center property. Stip., Exh. 1. There was no basis, accordingly, for confiscating Respondent's private property.

Argument

1. *The Panel Decision Is Contrary to Babcock & Wilcox and Board Decisions Thereunder*

In *Babcock & Wilcox*, as the Board recently observed, the Supreme Court held that, in the absence of discrimination, "an employer may validly post his property against non-employee distribution of literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message."[7] This same rule should apply to the exercise of Section 7 rights generally. It makes little difference, for example, that the Union here chose nonemployee picketing,[8] rather than handbill distribution, as its means of communication. Nor does the assertion "quasi-public" nature of

6. Effective communication of the Union's message could also have been achieved by any of the other media described in *Babcock & Wilcox:* mail distribution to potential customers and Butler employees; door-to-door contacts with such persons; newspaper, radio and television communication; telephone solicitations of the desired audience; etc. Moreover, there was no showing that Union picketing at the Butler warehouse did not constitute a reasonable alternative.

7. *Monogram Models, Inc., supra,* 77 LRRM at 1914.

8. The pickets here—employees of the Butler Shoe Warehouse in Atlanta—were "nonemployees" for the purposes of *Babcock & Wilcox*. They had no normal business at the Butler retail store in

a shopping center alter the situation—a shopping center is surely no more or less accessible to the public than the large hotel involved in *New Pines* which was "open year round and provides rooms, food, beverages, and entertainment for 900 guests."[9] The test in this case, as in *New Pines*, must be whether the inaccessibility of the desired audience makes ineffective reasonable attempts to communicate through the usual channels.

It is clear, for the reasons previously described, that in the instant case the Union's desired audience was not inaccessible. Nor did the Union make any attempt to utilize alternative available means of communication. While, as in *Monogram Models*, the most convenient place to picket may have been in front of the Butler store, the *Babcock & Wilcox* criterion is "not one of reasonable convenience, but rather whether the [desired audience is] . . . beyond the reach of reasonable union efforts to communicate with them." 77 LRRM at 1914. There has been no such showing in this case. On this ground alone, rehearing, and a reversal of the panel decision, is warranted.

2. *The Panel Decision Is Contrary to Logan Valley*

Even assuming *arguendo* that *Logan Valley* and not *Babcock & Wilcox* applies here, that case does not sanction the union conduct here involved.

In *Logan Valley* the Court balanced free speech rights against property rights, weighing employer activity which "substantially

the Center. This case, therefore, does not fall within the different rule applicable where, as stated in *Babcock & Wilcox,* employees desire "to discuss self-organization among themselves."

9. *New Pines, Inc., supra,* 77 LRRM 1544-5. See also *S. & H. Grossinger's Inc.,* 156 NLRB 223, *enf. den.,* 372 F. 2d 26 (2d Cir. 1967) and *Kutsher Hotel & Country Club, Inc.,* 175 NLRB No. 76, *enf. den.,* 427 F. 2d 200 (2d Cir., 1970); and see also *Priced-Less Discount Foods, Inc.,* 162 NLRB 872 (1967), a case relied upon by both the General Counsel and the panel decision. There, notwithstanding that the site was one "open to the public and employees," the Board applied the *Babcock & Wilcox* test and found an unfair labor practice solely because the employer had prohibited the Union's desired activity while having previously permitted such conduct by other nonemployees. 162 NLRB at n. 1.

hinder[s] the communication of the ideas which [the Union] seeks to express" against union activity which "significantly interfere[s] . . . with the use to which the mall property was put by both [Respondent] and the general public." 391 U. S. at 323. The pickets there were allowed access not as a matter of absolute right but as a result of an accommodation of conflicting interests based on the specific factual circumstances involved.

In this case, as previously demonstrated, the Union, unlike the union involved in *Logan Valley*, had effective alternative means by which to communicate its ideas. The Respondent was not seeking to "immunize" the Center from on-the-spot criticism or create "a *cordon sanitaire* of parking lots around [its] store." 391 U. S. at 324-5. To repeat, the Union was perfectly free to accept the Respondent's offer that it picket at the entrances to the enclosed mall. Such a site would have afforded the Union a proximate, safe and effective place to communicate its message.

Moreover, since any remedy the Broad fashions must "ensure non-interference with customers and employees,"[10] the significant interference that would have resulted from the Union's desired activity further strikes the balance against permitting such activity. Here, in contrast to *Logan Valley*, a "significant claim to a protection [can] be raised." *Id.* at 324. There is a clear likelihood that the pickets in this case would have physically interfered with the retail operation of the various stores, kiosks and booths located within the mall. There was a circumscribed area available; it is almost inevitable that picketing along the narrow common aisleways would impede entry to business, usurp customer accessways and rest areas and disturb pedestrian traffic. Indeed, the prospect that such interference would cause an obstruction or escalate into a breach of peace, thereby seriously interfering with business operations, is the reason that picketing at such a location would have been unlawful under Georgia law.[11] At the very least, picketing inside the mall would seriously

10. *Logan Valley*, 391 U. S. at 323 (Douglas, *J.*, concurring).

11. See pp. 11-12, *infra*. The panel decision appears to require, as a prerequisite to a lawful assertion of the employer's rights, evidence of actual undue interference "with the normal use of the mall."

distract customers from the very purpose for which they have been invited there—shopping.[12]

The enclosed mall in this case is substantially similar to a department store with the various tenant stores comparable to the separate leased departments of such a store. In fact, the reasons for prohibiting solicitation from both selling and public non-selling areas (such as waiting rooms, restrooms, elevators and corridors) of retail stores—that such conduct would interfere with the conduct of the employer's business and pose no unique problems of union communication[13]—are surely equally applicable here where picketing, a more signficant interference than mere solicitation, is involved. For the same reasons that picketing could be forbidden either inside a store or in obstructing entrances, the Respondent had a right to prevent the Union from picketing inside the enclosed mall. The contrary decision of the panel should be reexamined and reversed.

Sl. Op., p. 7. In other words, the panel would require that an employer await an actual breach of peace before removing an inherently disturbing element from its property. This unreasonable requirement is clearly neither sanctioned by Georgia or Board law. See, *e.g.*, *Marshall Field & Co.*, 98 NLRB 88, *enfd.*, 200 F. 2d 375 (7th Cir. 1952), where the *possibility* of interruption or disturbance was considered sufficient to exclude solicitation from both the selling and nonselling areas of a retail store.

12. The public comes to the North DeKalb Shopping Center because of the substantial investment that has been made to gain and retain its patronage. The patrons have been led to believe, through the expenditure of considerable money and effort, that the Center is a comfortable and convenient place to do business. They have a limited amount of shopping time available. If, upon entry, such prospective customers are enticed to devote their restricted purchasing time to a variety of controversial competing uses, there will clearly be a serious adverse effect on the normal sales activities of the Center. It is for this very reason that even the tenant stores, apart from the kiosks which pay for the privilege, have been prohibited from utilizing the common aisleways of the mall for their own purposes. To now appropriate Respondent's property for the activities of others is truly "to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country." *Logan Valley*, 391 U. S. at 333 (Black, *J.*, dissenting).

13. *Marshall Field & Co., supra*. See also the various other cases in which the Board has held that employers may lawfully prohibit

3. *The Panel Decision Is Contrary to the Doctrine of Abstention*

Even if the Union does have a right to picket inside the mall, the Board should not interfere, as it has here,[14] with state criminal proceedings. The same rules of abstention which apply to federal court injunctions of state proceedings apply with equal force to Board cease and desist orders. In each case, an agency of the federal government—through an enforceable order—stays a valid state court proceeding or threat thereof.

In *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943), the Supreme Court held that federal courts (and similarly a federal agency with judicially enforceable cease and desist powers) should not interfere with, and should not enjoin, enforcement of state law in the absence of a showing that the state will enforce its law in bad faith or that irreparable harm will result. The Court also held that arrest, prosecution and conviction for violation of a city ordinance is not such irreparable harm as would justify a federal court's interference. Accord: *Cameron* v. *Johnson*, 390 U. S. 611 (1968).

Here there was no showing that the state trespass law invoked by Respondent to remove pickets from its property was invalid[15]

nonemployees from soliciting and distributing union matter in certain areas of retail store premises and enforce that prohibition by expulsion and by maintenance of surveillance over the nonemployees who enter the store for such purposes as, *e.g.*, *G. C. Murphy Company*, 171 NLRB No. 45; *Heck's, Inc.*, 170 NLRB No. 53; and *Super X Drugs of West Virginia, Inc.*, 169 NLRB No. 42.

14. The Board found specifically that the "threat to cause the arrest of the pickets for criminal trespass" violates the Act (Sl. Op., p. 7) and issued a cease and desist order (*i.e.*, an injunction) against such threat (Sl. Op., p. 8), thereby staying the normal criminal law processes of the State of Georgia.

15. The Georgia trespass law (Georgia Rev. Code § 26-3005) provides:

> It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor.

This statute has been repeatedly applied in cases similar to the instant one. See, *e.g.*, *Walker* v. *State*, 220 Ga. 415, 139 S. E. 2d 278 (1964) (trespass conviction for demonstrating inside of a restaurant) and *Kitchens* v. *State*, 221 Ga. 839, 147 S. E. 2d 509 (1966) (trespass conviction for creating a disturbance inside of a high school).

or that Georgia would enforce this law in bad faith. Indeed, as Chief Justice Burger noted in a similar situation in *Taggart* v. *Weinacker's*, 397 U. S. 223, 227 (1970) (concurring opinion), ". . . the protection of private property whether a home, a factory, or a store, through trespass laws, is historically a concern of state law." The Court has also noted that "federal interference with State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework." *Dombrowski* v. *Pfister*, 380 U. S. 479, 484 (1965). Only where "the fact of prosecution" has a "chilling effect upon the exercise of First Amendment rights" (*id.*, at 487) should a federal agency—a court or a quasi-judicial administrative body —impede the normal enforcement of state law. There has been no such showing here.

Conclusion

For the foregoing reasons, it is respectfully submitted that this case should be reconsidered by the Board *en banc*, and Respondent should be afforded the opportunity for oral argument of its position before the entire Board.

Respectfully submitted,

C. Dale Harman
Jones, Bird & Howell
Fourth Floor Haas-Howell Building
Atlanta, Georgia 30303

Alan Raywid
Burt A. Braverman
Cole, Zylstra & Raywid
2011 Eye Street, N. W.
Washington, D. C. 20006

Dated: October 1, 1971 *Attorneys for Respondent*

BEFORE THE NATIONAL LABOR RELATIONS BOARD

* * (Caption—10-CA-8823) * *

ORDER DENYING MOTIONS

On August 16, 1971, the Board issued its Decision and Order in the above-captioned proceeding, finding that the Respondent has engaged in certain unfair labor practices and ordering that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Thereafter, the Respondent filed an untimely request for an extension of time within which to file a Motion for Reconsideration, which request the Board granted on September 14, 1971, for good cause shown. Under date of September 15, 1971, the Charging Party filed a document entitled "Motion in Opposition to Respondent's Motion for the Board to Reconsider its Decision and Order," in which it urged that the Board deny any motion for reconsideration filed by the Respondent on grounds of untimeliness and mootness. Subsequently, within the time allowed, the Respondent filed a motion for Reconsideration by the Board *en banc* and a request for oral argument, and the General Counsel filed a telegram in opposition.

As the Panel which originally considered this case can no longer be reconvened, the Board has considered the motion *en banc*. The Board having duly considered the matter:

It Is Hereby Ordered that the Charging Party's motion to deny the Respondent's Motion for Reconsideration on grounds of untimeliness and mootness be and it hereby is denied as lacking in merit.

It Is Hereby Further Ordered that the Respondent's Motion for Reconsideration be and it hereby is denied, as it presents no matters or issues within the scope of the record which have not been previously presented to and considered by the Board.

The Respondent's request for oral argument is accordingly also denied.

Dated, Washington, D. C., October 19, 1971.

By direction of the Board:

GEORGE A. LEET
Associate Executive Secretary

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
* * (Caption—10-CA-8823) * *

ORDER REMANDING PROCEEDING TO ADMINISTRATIVE LAW JUDGE

On August 16, 1971, the National Labor Relations Board issued its Decision and Order[1] in the above-entitled proceeding finding that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, and ordering Respondent to cease and desist therefrom and to take certain affirmative action, set forth therein.

Thereafter, while Respondent's Petition to Review and Set Aside the Board's Order, and the Board's answer and cross application for enforcement of its Order were pending before the United States Court of Appeals for the Fifth Circuit, the Supreme Court rendered its decisions in *Central Hardware* v. *N. L. R. B.*, 407 U. S. 539, and *Lloyd Corporation, Ltd.* v. *Tanner*, 407 U. S. 551. The Board moved the court to remand this proceeding to the Board for further consideration, and Respondent moved for summary reversal, in light of said decisions, and on July 17, 1972, the Court of Appeals for the Fifth Circuit remanded the instant case to the Board for reconsideration.

Subsequent to the remand, the Board, by letter dated September 15, 1972, advised the parties that they may submit statements of position with respect to the issues raised by the remand. Such statements were duly filed by Respondent and General Counsel. and the Respondent also filed a Motion to Remand to an Administrative Law Judge. The Board having duly considered the positions advanced by the parties, concludes that a hearing is required on the issues involved and the case should be remanded for such a hearing. Accordingly,

1. 192 NLRB No. 111.

It Is Hereby Ordered that the record be reported, and that a hearing be held before an Administrative Law Judge, to be designated by the Acting Chief of the Division of Judges, for the purpose of receiving evidence on the issues raised by the principles set out in *Central Hardware Co. N. L. R. B., supra,* and *Lloyd Corp., Ltd.* v. *Tanner, supra.*

It Is Further Ordered that the proceeding be, and it hereby is, remanded to the Regional Director for Region 10 for the purpose of arranging such hearing, and that said Regional Director be, and he hereby is, authorized to issue notice thereof.

It Is Further Ordered that upon the conclusion of such hearing, the Administrative Law Judge shall, on the evidence received pursuant to this Order and in the light of the opinion of the Supreme Court in *Central Hardware* v. *N. L. R. B., supra,* and *Lloyd Corporation, Ltd.* v. *Tanner, supra,* prepare and serve upon the parties a Decision containing findings of fact, conclusions of law, and recommendations based upon the evidence received, and that, following the service of such decision upon the parties, the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, shall be applicable.

Dated, Washington, D. C., November 17, 1972.

By direction of the Board:

GEORGE A. LEET
Associate Executive Secretary

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

* * (Caption—10-CA-8823) * *

RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

The Respondent excepts to the failure of the Administrative Law Judge to make certain findings, conclusions and recommendations, as hereinafter specified:

1. At Decision 4 (hereinafter ALJD) lines 9-12: The finding that all the employees of Butler Shoe Corporation, regardless of their place of employment, are equally situated in respect to Section 7 rights solely because they work for the same parent company. This is in direct opposition to Board policy evidenced in *NLRB* v. *Cranston Print Works Co.*, 258 F. 2d 206 (4th Cir. 1958), where the court distinguished for trespass purposes between "active" employees and employees on an extended leave of absence and *Diamond Shamrock Co.* v. *NLRB*, 413 F. 2d 52, 57 (3rd Cir. 1971), which held on-duty employees were governed by different rules of access than off-duty employees. Under Board policy, therefore, the picketing employees here were "non-employees" for the purpose of applying the *Babcock & Wilcox* test.

2. At ALJD 4, lines 14-35: The failure to find that the Union could have picketed anywhere on Center property *except* inside the enclosed mall common aisleways; and discrediting the testimony of Douglas Ballard. Ballard's present testimony in this respect (R. 93-6) was in accord with both Long and his own prior evidentiary affidavits (Exh. 3 and 4 to the previously agreed-upon Stipulation), the admitted statements then made by Hudgens' attorney Davis to Union attorney Stanford (Stip., par. 3), the present testimony of pickets Taylor and Glenn (R. 35, 39-40, 43-4) and the position which Hudgens has repeatedly taken before both the Board and the Fifth Circuit.

3. At ALJD 4, lines 37 to p. 5, line 6, and fn. 1: The finding that both *Central Hardware*, as well as *Nichols of Ohio*, 200 NLRB No. 161, are "not precedent for what the law may be on this set of facts." In holding that the size of the North DeKalb Center was a distinguishing factor, the Administrative Law Judge's decision flew in the face of the Supreme Court's declaration in *Lloyd* that the "character of . . . privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center." 33 L. Ed. 2d at 143. The critical question, which the Judge ignored, was whether the North DeKalb Shopping Center "had assumed the functions of the normal municipal 'business block.'" *Central Hardware*, 33 L. Ed. 2d at 128. If the Judge had made this inquiry, he would have resolved the question in the negative.

4. At ALJD 5, lines 9-30: The finding that the pickets were "engaged in conduct directly related to the purposes" the Center is used for. This finding is immaterial. It makes no difference that the Union's forum of expression here was publicity picketing, rather than handbill distribution or solicitation of employees and customers. What is critical is that the Union elected to invoke its alleged Section 7 rights before the Board; it did not seek, as it surely could have, to assert its purported constitutional rights before a state or federal court.

5. At ALJD 6, lines 27-35: The finding that the Supreme Court "realistically" agrees with the General Counsel's [*sic*] of the facts and the reliance on *Logan Valley* as support for this finding. This is not only an erroneous application of law, but contradicts this Administrative Law Judge's finding in this very case that the test to be applied is ". . . that set out in *Babcox and Wilcox*" rather than *Logan Valley*. Further, the Administrative Law Judge totally ignored extensive testimony proving that the North DeKalb mall did not assume in *any* way the functional attributes of property devoted to public use.

6. At ALJD 6, lines 39-54: The conclusion that the *Babcox & Wilcox* test, as reaffirmed in *Central Hardware*, is rendered inapplicable to resolution of the conflicting Section 7 and private property rights herein, due to the Judge's erroneous finding that the picketing was limited in scope to potential Butler Shoe customers *inside* the mall. Contrary to the Judge, *Babcock & Wilcox* and *Central Hardware* control disposition of this case. Moreover, the Judge's conclusion is internally inconsistent with his later conclusion (p. 8, lines 8-9) that *Babcock & Wilcox* is dispositive.

7. At ALJD p. 7, lines 15-39: The finding that other means of communication available to the Union are unreasonable because the Judge's feeling that the Union should not be required to "squander its assets in this fashion," or "dilute its message." Contrary to the Judge, the Board has recently held alternative avenues of communication are not unreasonable merely because they are "perhaps more expensive and less convenient" means of reaching the desired audience. *Monogram Models, Inc.*, 192 NLRB No. 99; *Dexter Thread Mills, Inc.*, 199 NLRB No. 113. The "proper aims of business men" are not dissimilar to those of a union; the means utilized to communicate a message not to purchase from a particular merchant are no different than those used to encourage such purchases.

8. At ALJD p. 7, lines 41 to p. 8, lines 1-8: The application of *Logan Valley* criteria to this case. *Central Hardware* holds that in cases involving Section 7 of the Act, *Babcock & Wilcox* standards, rather than *Logan Valley*, apply.

9. At ALJD p. 8, lines 10-14: The conclusion that the General Counsel has proven that the Union had no other reasonable means to convey its message. This conclusion is unsupported by a preponderance of the evidence.

10. At ALJD p. 8, lines 14-20: The Judge's attempt to reduce the available avenues of communication to only one option, e.g., picketing at the highways bordering the mall. This

erroneously narrows and mischaracterizes the wide spectrum of alternative avenues of communication open to the Union.

11. At ALJD p. 8, lines 24-27: The Judge's recommendation that the Board adhere to its original findings and issue a remedial order. The recommendation is erroneous as a matter of law and is unsupported by the preponderance of the evidence.

On the basis of the record herein, the Administrative Law Judge should have dismissed the Complaint in its entirety.

Respectfully submitted,

By /s/ LAWRENCE M. COHEN
LAWRENCE M. COHEN
LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

C. DALE HARMAN
JONES, BIRD & HOWELL
Haas-Howell Building
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

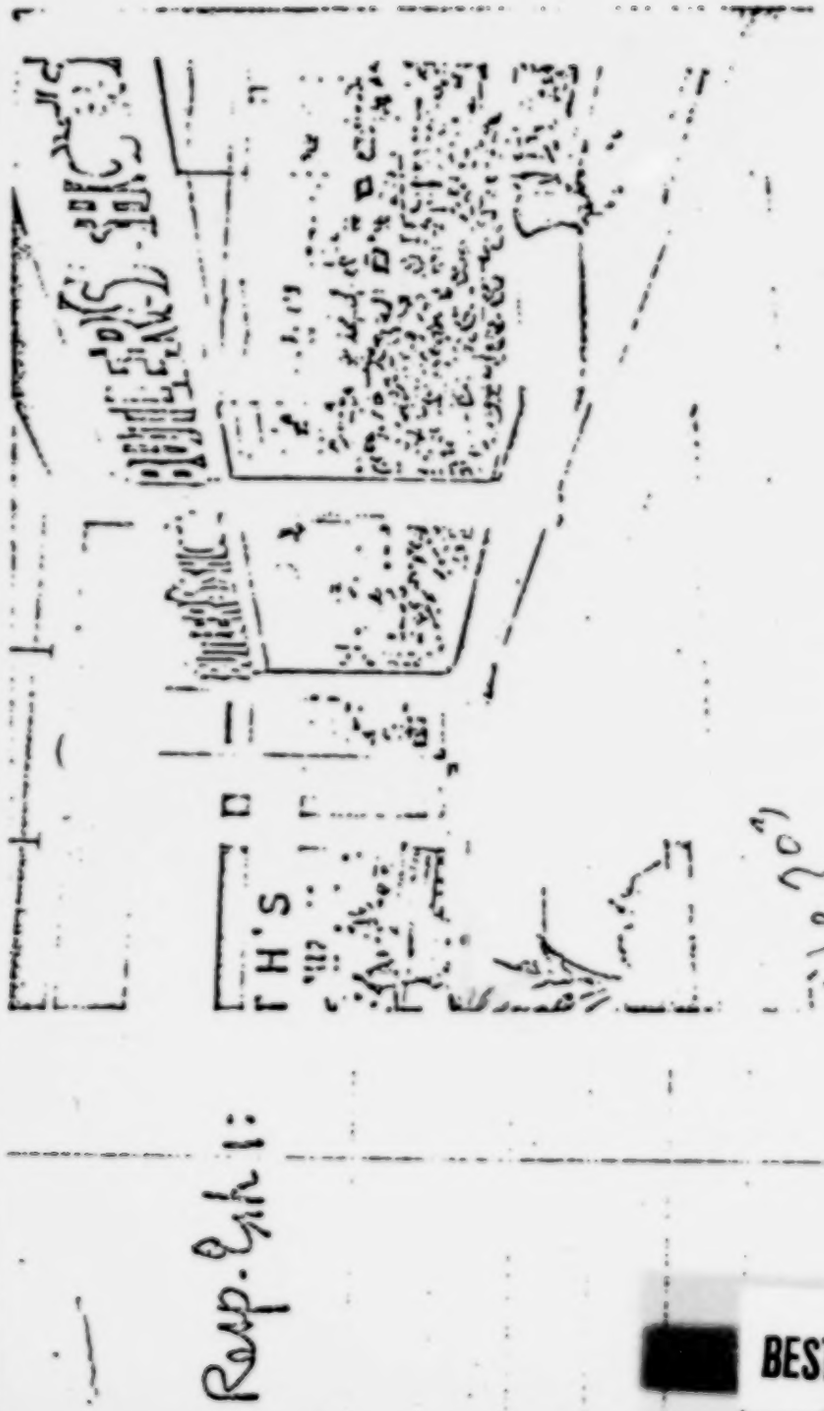
The undersigned, one of the attorneys for Scott Hudgens, an individual, hereby certifies that he has this day served a copy of the attached Respondent's Exceptions to Administrative Law Judge's Decision, by United States Certified Mail, Return Receipt Requested, postage prepaid, upon each of the following:

SYLVIO L. MASCOTTI, ESQ.
Room 710
730 Peachtree Street, N. E.
Atlanta, Georgia 30308

GUY H. DICKINSON, ESQ.
Regional Director, Retail, Wholesale and Department Store Union, AFL-CIO
1838 Stewart Avenue, S.W.
Atlanta, Georgia, 30315

/s/ LAWRENCE M. COHEN
Lawrence M. Cohen

Dated: May 25, 1973.



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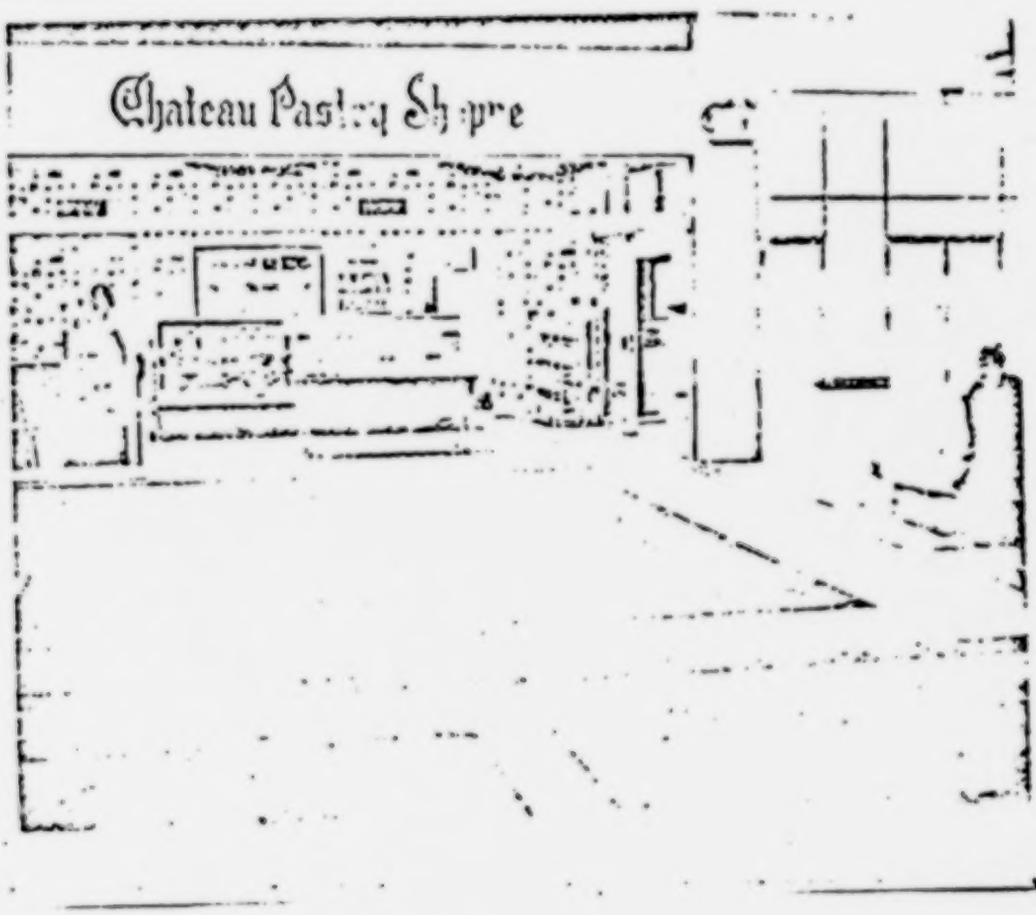
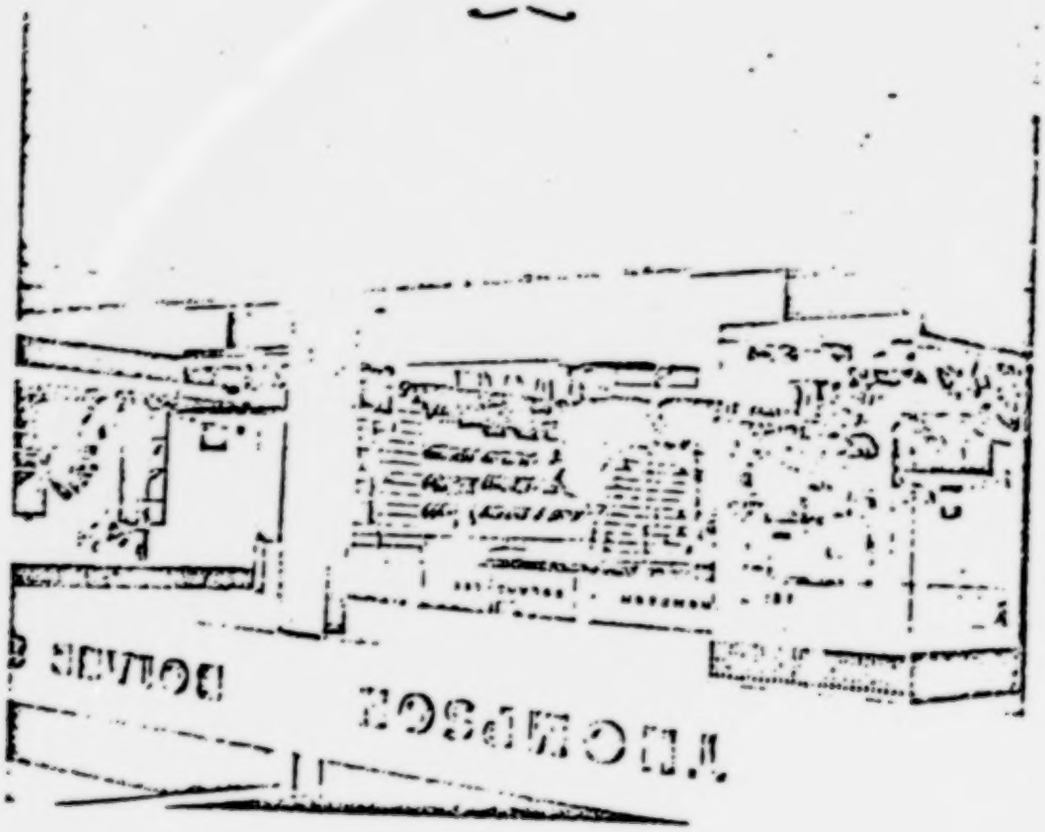
Resp. Exh. 6





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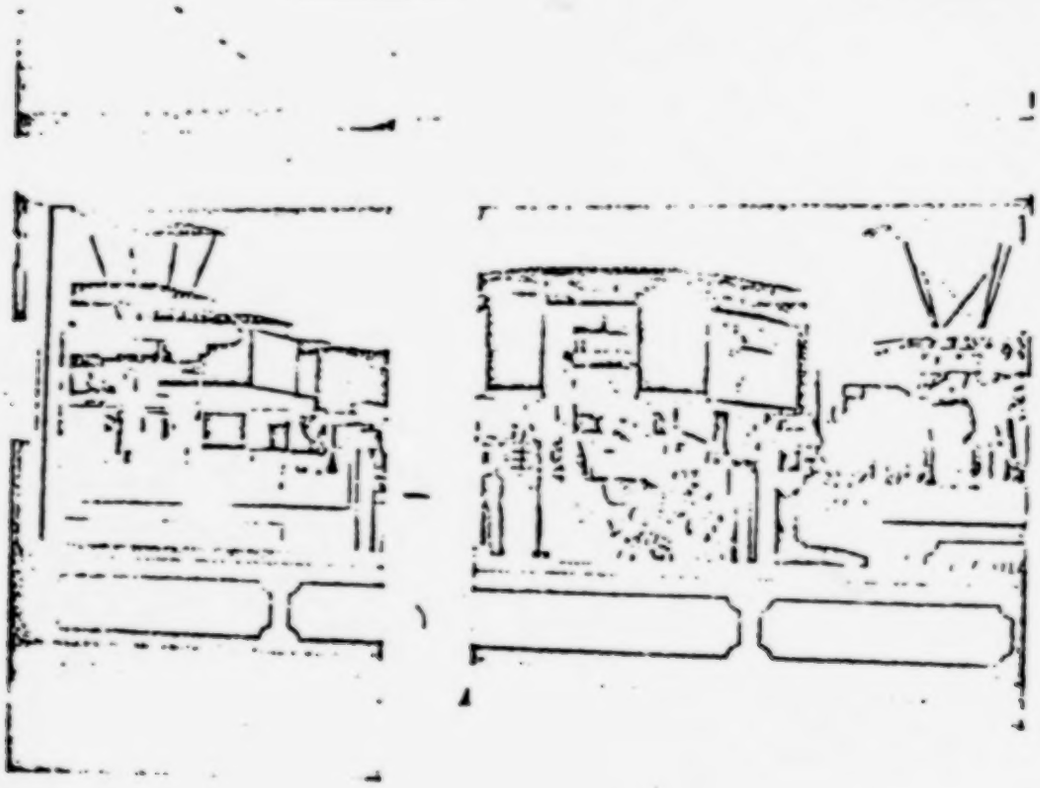

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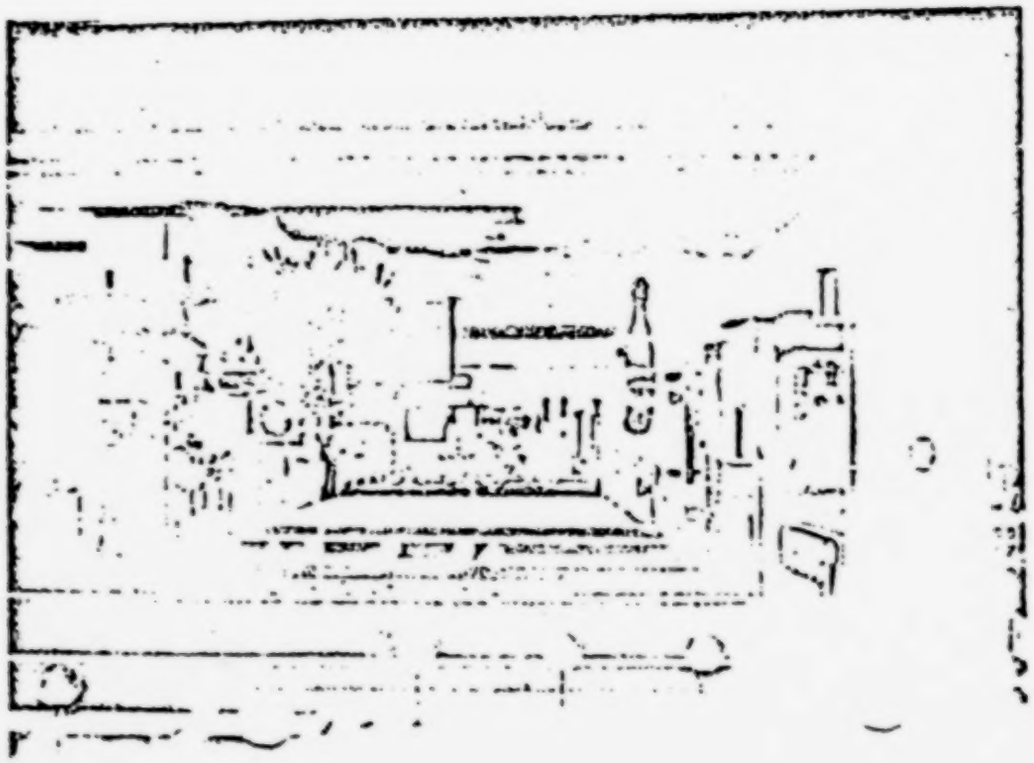

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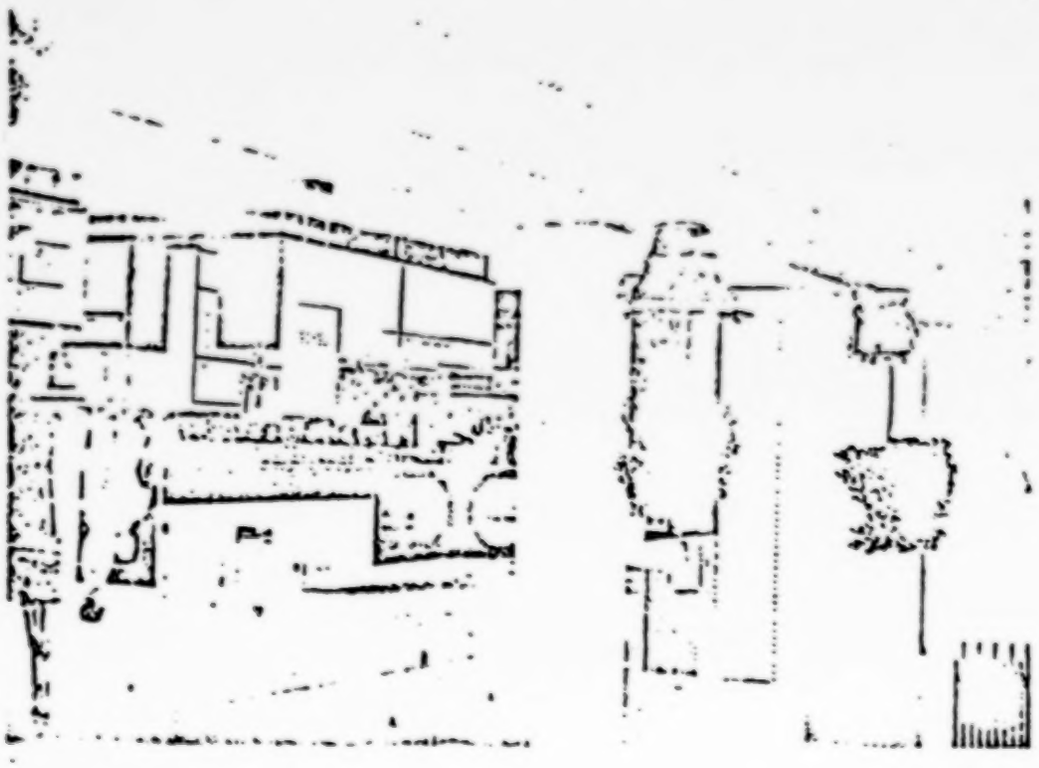
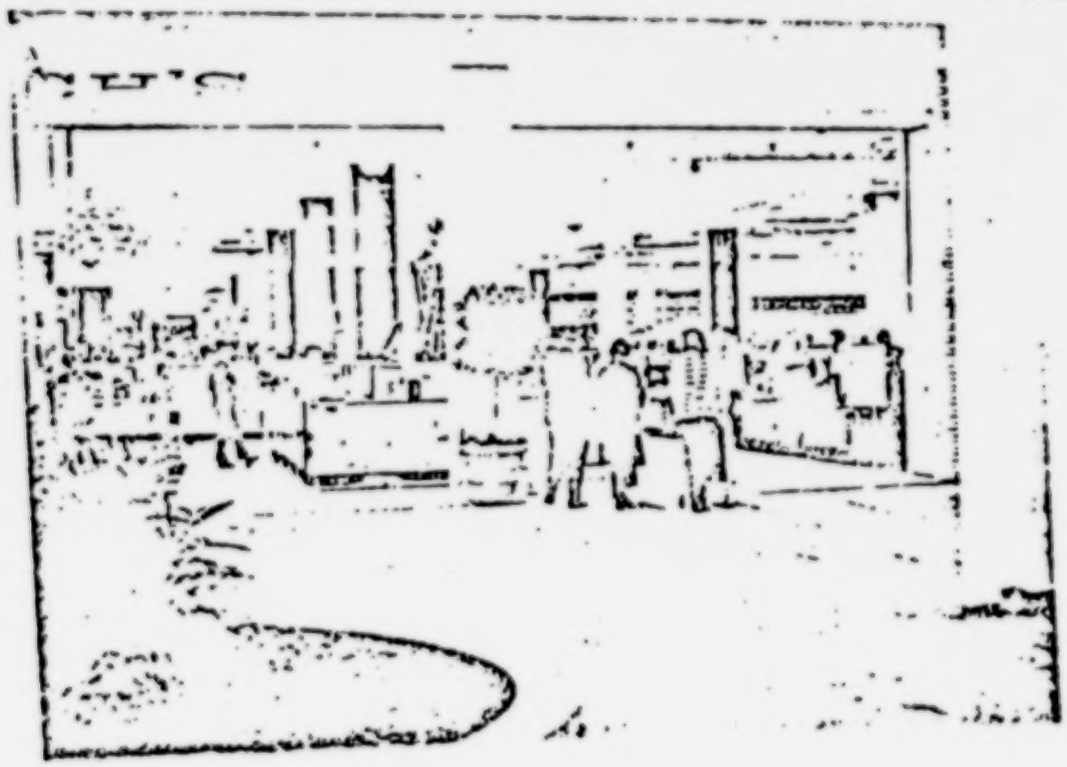
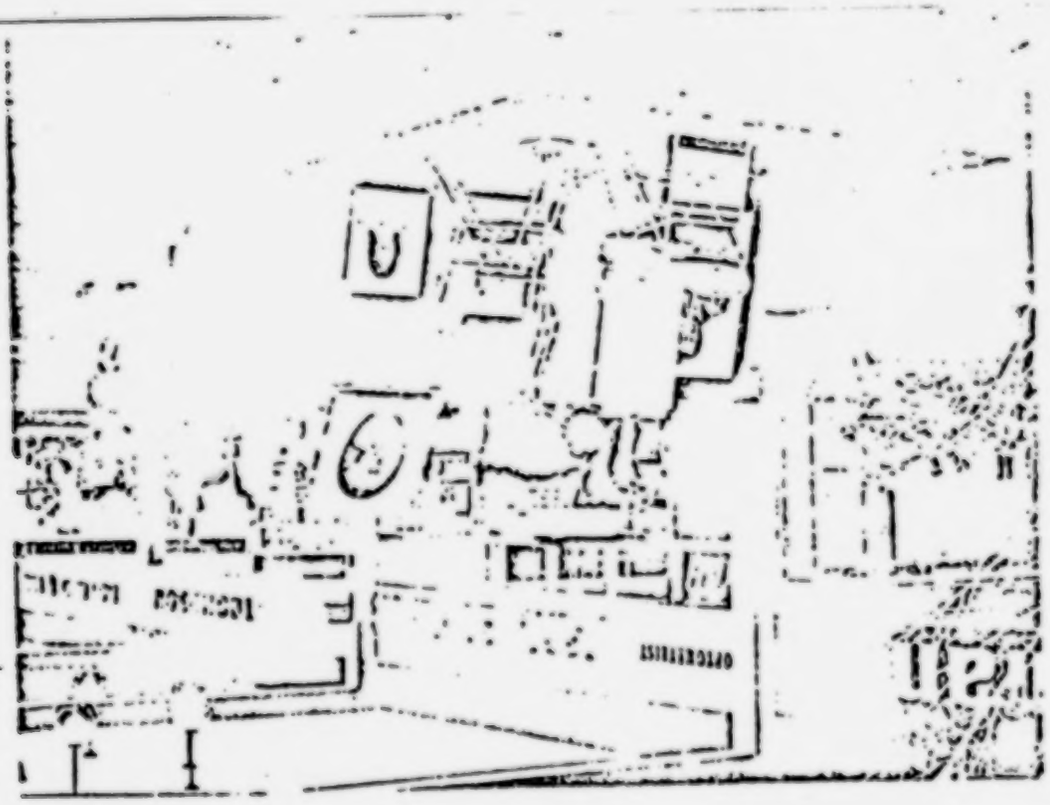


Fig. Ex. 14

Rep. Exh. (16)





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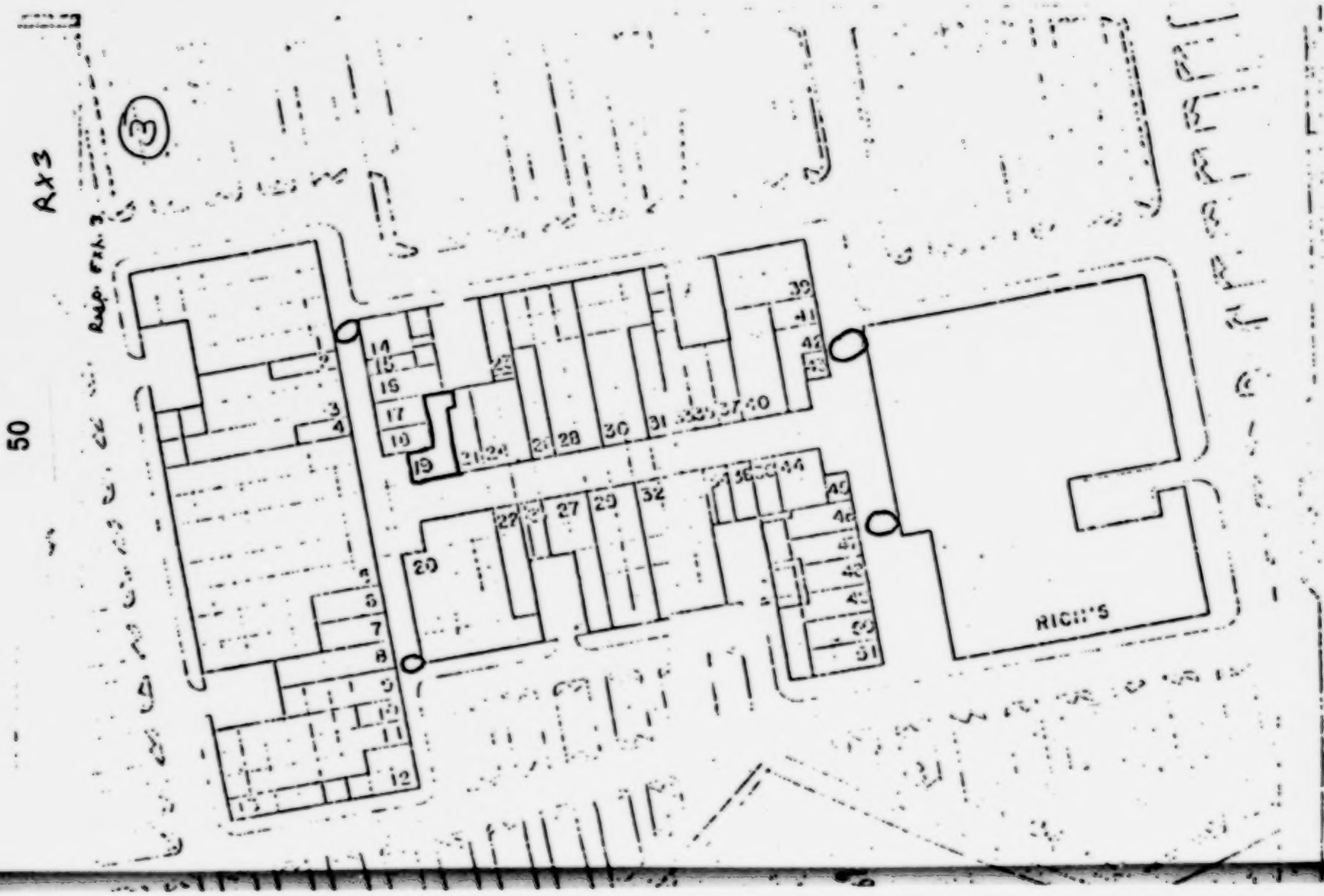
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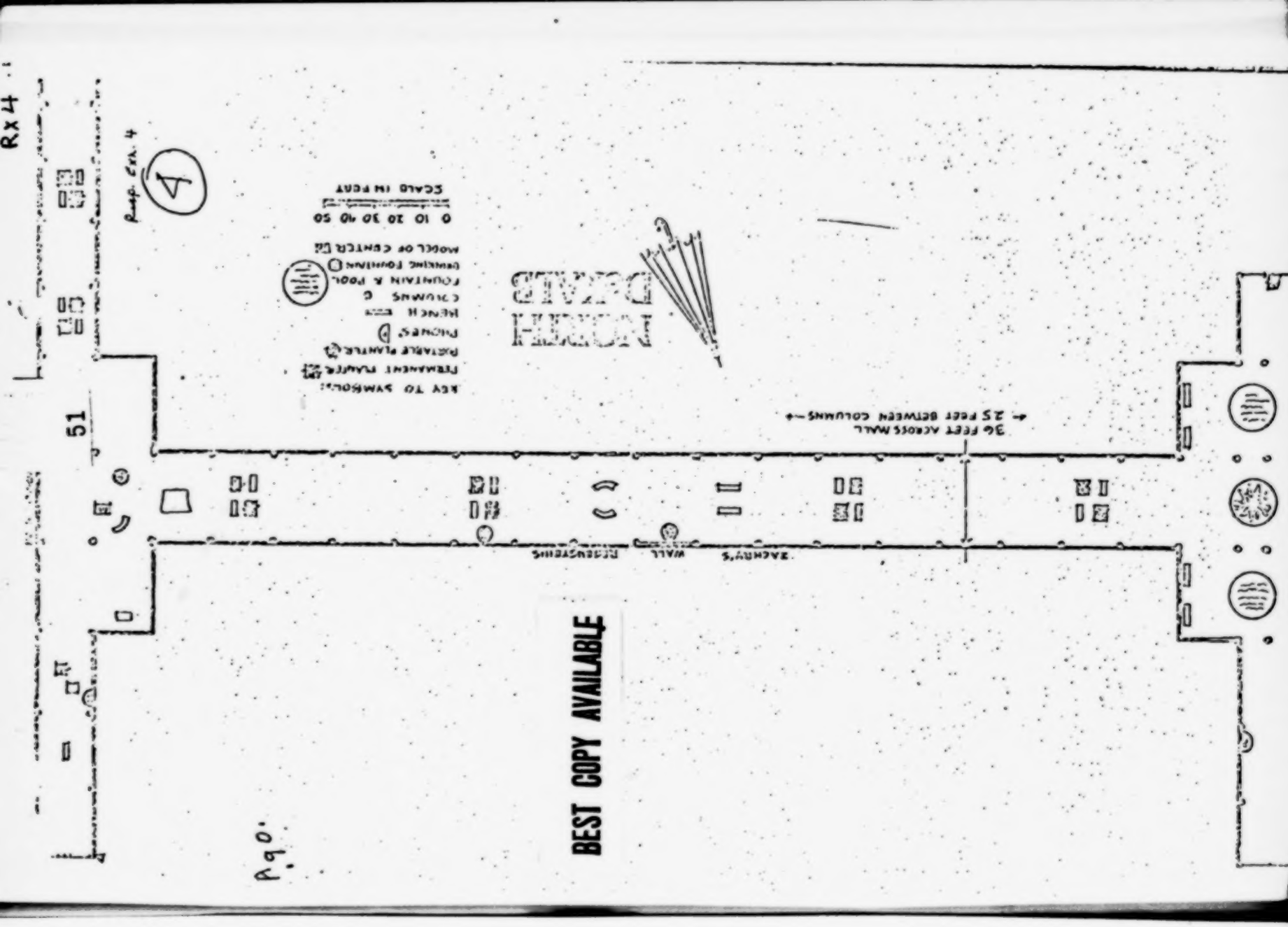
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KEY TO SYMBOLS:
PERMANENT PLANTER
MOVABLE PLANTER
PICNICS
BENCH
COLUMNS
FOUNTAIN & POOL
DRINKING FOUNTAIN
MODEL OF CENTER
0 10 20 30 40 50
SCALE IN FEET
36 FEET ACROSS MALL
25 FEET BETWEEN COLUMNS
ZACHRY'S
WALL
RESERVOIRS
PROPOSED
PRIVATE
DRIVE
NORTH
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RESPONDENT'S EXHIBIT 5

SHOPPING CENTER LEASE

An Enterprise of
Scott Hudgens

1. *Rent*

1.1. ***Minimum Rent.*** Lessee shall pay to Lessor, at the address designated by Lessor, a fixed, annual minimum rent of $....., payable in advance in equal monthly installments of $..... due on the first day of each calendar month throughout the term hereof. Such rent shall be prorated for any month in which the Lease is not in effect for the entire month.

1.2. *Percentage Rent.* Lessee agrees to pay to Lessor, by semi-annual payments due on July 20 and January 20, during each year, or fraction thereof, during the term of this Lease, a percentage rent, the payment due on July 20, being a sum of money equal to the amount by which ..... percent of Lessee's gross sales from the Demised Premises during the immediately preceding January 1 to June 30 period exceeds the minimum rent due from Lessee to Lessor from the same January 1 to June 30 period, and the January 20 payment being a sum of money equal to the amount by which said percent of Lessee's gross sales from the Demised Premises during the immediately preceding July 1 to December 31 period exceeds the amount of minimum rent due from Lessee to Lessor from the same July 1 to December 31 period. On the termination date of the term of this Lease, Lessee shall pay to Lesser the sum of money by which said percentage of Lessee's gross sales from the Demised Premises from the first of the month in which the last payment of percentage rental was due (January or July as the case may be) to the termination date exceeds the amount of minimum

rent due from Lessee to Lessor from the first of the month of the last due date of percentage rent to the date of termination.

* * * * *

4. *Common Areas*

4.1. *Parking and Access.* Lessor agrees that access roads, footways and parking facilities will be provided for the Shopping Center. Lessor reserves the unrestricted right to change the building perimeters, parking areas, any access roads, the sizes, identity, location and type of stores and any common areas or to construct new additional buildings, parking facilities or common areas; Provided, however, that the square footage of and access to the Demised Premises shall not be substantially or materially impaired.

Lessor hereby grants to Lessee, its employees, agents, customers and invities, the non-exclusive right to use the parking and other common areas as from time to time constituted, such use to be in common with Lessor, Lessor's licensees and all occupants of the Shopping Center, from time to time, its and their employees, agents, customers and invitees, Except when the same are being repaired, altered or constructed. Lessee shall not make any charge for customer parking. Lessor reserves the right to designate one or more areas in the Shopping Center for employee parking and Lessee shall cause its employees to park their vehicles only in such designated areas.

If at any time it becomes necessary for the purpose of preventing the acquisition of public rights in the common areas, Lessor may temporarily close portions of the common areas, erect private boundary marks or take further appropriate action for that purpose, and such action shall not be deemed an eviction or disturbance of Lessee's use of the Demised Premises. Lessor reserves the right, from time to time, to dedicate portions of the common areas to the public.

4.2. *All Weather Mall.* Lessor shall provide for the use and enjoyment of all occupants of the Shopping Center and their employees and invitees, an enclosed, all weather mall, which shall be maintained at a comfortable temperature during the normal business hours set by Lessor.

4.3. *Common Area Maintenance.* Lessee shall pay as additional rent, in monthly installments of $..... each, in advance, its share of the cost of the operation and maintenance of the common area, including those costs incurred for security, lighting, painting, cleaning, policing, inspecting, landscaping, repairing and replacing, which may be incurred by Lessor in its discretion, including a reasonable allowance for Lessor's overhead cost, depreciation of and taxes on maintenance equipment, the cost of hazard and public liability insurance, real property taxes on the common area, and the cost of all water consumed in the Shopping Center which is not separately metered to tenants. Lessee's share of such cost shall be determined by multiplying Lessor's cost by a fraction, the numerator of which is the number of square feet in the Demised Premises, and the denominator of which is the average number of square feet in the Shopping Center leased by Lessor during the preceding calendar year. The product so obtained shall be Lessee's share, and the January bill shall be adjusted to properly reflect Lessee's share during the preceding calendar year.

4.4. *Mall Maintenance, Heating and Air Conditioning.* If the Demised Premises opens onto the enclosed mall, Lessee shall pay, additional rent, in monthly installments of $..... each, in advance, Lessee's proportionate share of the security, operation, heating, air conditioning, maintenance costs, cost of hazard and public liability insurance and real property taxes on the enclosed mall. Lessee's share of such cost shall be determined by multiplying Lessor's cost by a fraction, the numerator of which is the number of square feet in the Demised Premises and the denominator of which is the average number of square feet in stores within the Shopping Center opening onto the enclosed mall and leased by Lessor during the preceding calendar year. The product so obtained shall be Lessee's share, and the January bill shall be adjusted to properly reflect Lessee's share during the preceding calendar year.

5. *Use of Demised Premises*

5.1. *Use and Care.* The Demised Premises shall be used only for .....

.....

.....

.....

and for no other purpose without the written consent of Lessor. Lessee shall, at Lessee's expense, promptly comply with all law, ordinances and regulations promulgated by duly instituted governmental authority affecting the cleanliness, safety, use and occupancy of the Demised Premises. Lessee agrees that it will not keep, use, sell or offer for sale in or upon the Demised Premises any article which may be prohibited by the standard form of fire insurance policy. Lessee agrees to pay any increase in premiums for fire and extended coverage insurance that may be charged during the time of this Lease on the amount of such insurance that may be carried by Lessor on Demised Premises or the building of which they are a part resulting from the type of merchandise sold by Lessee in the Demised Premises, whether or not Landlord has consented to the same. In determining whether increased premiums are the result of Lessee's use of the Demised Premises, a schedule, issued by the organization making the insurance rate on the Demised Premises, showing the various components of such rate, shall be conclusive evidence of the several items and charges which make up the fire insurance rate on the Demised Premises.

In the event that Lessee's occupancy causes any increase of premium for the fire, boiler and/or casualty rates on the De-

mised Premises or any part thereof above the rate for the least hazardous type of occupancy legally permitted in the Demised Premises, the Lessee shall pay the additional premium on the fire, boiler and/or casualty insurance policies by reason thereof and the Lessee shall also pay in such event any additional premium on the rent insurance policy that may be carried by Lessor for its protection against rent loss. Bills for such additional premiums shall be rendered by Lessor to Lessee at such times as Lessor elects and shall be due from, and payable by Lessee when rendered, and the amount thereof shall be deemed to be, and be paid as, additional rent; Lessee will not injure or deface the Demised Premises; Lessee will not overload the floors of the Demised Premises; Lessee will not permit any objectionable noise or odor to escape from the Demised Premises and Lessee will not use the Demised Premises for lodging or sleeping purposes. Where loading and delivery spaces are provided, Lessee will not use the front entrances or permit same to be used for truck delivery or pick up of merchandise or supplies and Lessee shall endeavor to have all deliveries to the Demised Premises made no later than 10:00 A. M. Lessee will not encumber or obstruct the sidewalks, malls or common areas adjoining the Demised Premises nor allow the same to be obstructed or encumbered and Lessee shall not place or cause to be placed, any merchandise, vending machines or anything else on the sidewalks, malls or exterior or the Demised Premises without prior written consent of Lessor.

Lessee shall keep the Demised Premises clean, both inside and outside, at its own expense, and will remove the ashes, garbage, excelsior, straw and other refuse from said Demised Premises. Lessee will not burn any materials or rubbish of any description upon the Demised Premises or in the parking and common areas of said Shopping Center. Lessee also agrees to keep the sidewalks and parking areas adjoining said store free from ice, snow, rubbish, dirt, ashes, garbage, excelsior, straw and other refuse. Lessee agrees to keep all accumulated

rubbish in covered containers and to have same removed regularly. Lessee shall keep said sidewalks free from snow and ice. In the event Lessee fails to keep the Demised Premises and other portions heretofore described in the proper condition, Lessor may cause the same to be done for Lessee and Lessee hereby agrees to pay the expense thereof on demand as additional rent.

5.2. *Stores Fronting on Mall.* If the Demised Premises fronts on an enclosed all weather mall, then Lessee will keep open for walk through traffic 60% of such frontage during all times that Lessee's store is open for retail business. Lessee will further air condition the Demised Premises to the mall line, and will, at all times during which Lessee is open for retail business, maintain the following temperatures within the Demised Premises and to the mall line:

Heating Season: A prevailing minimum temperature of 70° F with outside temperature ranging to 10° F.

Cooling Season: A prevailing maximum temperature of 78° F and a relative humidity of 50%.

In all service and storage areas, except for the service court, a prevailing minimum temperature of approximately 60° F shall be provided during the heating season, and in the summer adequate ventilation shall be provided. Lessee's heating and cooling systems shall, during such time as Lessee is open for business, be operated in such a manner that the heating and cooling in the all weather mall is not drawn into the Demised Premises. The temperatures required to be maintained in the Demised Premises may, from time to time, be changed by Lessor to be consistent with the temperatures then being maintained in the enclosed, all weather mall.

5.3. *Merchandising*. Lessee will not conduct any auction, fire, bankruptcy or closeout sales or conduct any "Discount House" type of retail business provided, however, that this provision shall not preclude the conduct of periodic seasonal, promotional or clearance sales; will not use or permit the use

of any apparatus, for sound reproduction or transmission or of any musical instrument in such manner that the sounds so reproduced, transmitted or produced shall be directed primarily beyond the interior of the Demised Premises; will keep all mechanical apparatus free of vibration and noise which may be transmitted beyond the interior of the Demised Premises.

Lessee will keep the display windows in the Demised Premises electrically lighted and any electric signs lighted during the period required by the general rules governing the conduct of Lessee and other occupants in the Shopping Center; and Lessee will otherwise conduct its business in accordance with such general rules.

Lessee agrees that it will keep its business to be conducted from the Demised Premises open to the public for a minimum of six (6) days each week (Monday through Saturday) during the hours from 10:00 a.m. to 9:30 p.m. throughout the term hereof unless Lessor shall agree in writing that Lessee may remain open for fewer hours.

• • • • •

5.5. *On Premises Advertising.* Lessee will not place or suffer to be placed, or maintain on the exterior of the Demised Premises, any sign (other than one approved by Lessor), advertising matter or other thing of any kind, and will not place or maintain any decoration, lettering or advertising matter on the glass of any window or door of the Demised Premises without first obtaining Lessor's written approval thereof; and Lessee will maintain such sign, decoration, lettering, advertising matter and other things as may be approved in good condition and repair at all times. No flashing, scintillating or moving signs or lights will be installed by Lessee.

5.6. *Utility Bills.* Lessee shall pay all bills for water, gas, electricity, fuel, light, heat and power furnished to or used by Lessee on or about the Demised Premises, and all sewerage disposal or sewerage service charges for the Demised Premises. If Lessee does not pay the above bills, Lessor may pay the same,

and such payment shall be additional rent for the Demised Premises. Lessor may elect to furnish one or more utility services to Lessee, and, in such event, Lessee shall purchase such services from Lessor and shall pay, as additional rent, the charges for such services by Lessor which, in no event, shall exceed the rates which would be charged for the identical service furnished by the local public utility company. Lessor may discontinue furnishing any service, without obligation other than to connect the Demised Premises to the appropriate public utility.

• • • • •

7. *Merchants' Association*

7.1. *Membership.* Lessee agrees to join and maintain membership in the Shopping Center Merchants' Association and to contribute initially the sum of $..... to promotion. In addition, Lessee shall pay as additional rent, monthly installments of $..... each in advance as Lessee's contributions to the Merchants' Association. Lessee agrees to abide by and comply with all the by-laws, rules and regulations from time to time adopted by the Merchants' Association and to be and remain a member in good standing of the Merchants' Association.

• • • • •

NORTH DEKALB CENTER

NORTH DEKALB CENTER MERCHANTS' ASSOCIATION

"PERMIT"

This will serve as OFFICIAL AUTHORIZATION for the use of the NORTH DEKALB CENTER "CHARITY BOOTH" – at the Woolworth's end of the Mall.

(name of organization) _____ (purpose) _____ (date)

Please post this Permit when using Booth.

NORTH DEKALB CENTER MERCHANTS' ASSOCIATION

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RESPONDENTS EXHIBIT 19

RESPONDENT EXHIBIT 20

APPLICATION FOR USE OF THE AUDITORIUM

Date.....

Please return to:

North DeKalb Mall Merchants' Association

2026 Lawrenceville Highway

Decatur, Georgia 30033

Phone: 633-9397

Name of Organization.....

Date of Meeting.....

Time of Meeting: from ..... to .....

Special Arrangements Requested: .....

.....

.....

We Ask That You Observe the Following Rules:

1. Under no conditions will alcoholic beverages or gambling be permitted.
2. No commercial venture will take place in the auditorium.
3. No meeting, which the owners of the mall or their agent deems controversial, will be permitted.
4. We cannot be responsible for lost articles. Please take all of your articles with you upon completion of your program.
5. You will be held responsible for any damage to the premises. Please do not attach anything to the walls of the rooms without permission.
6. At the time you request rental, you are requested to inform us as to the number of tables and chairs you require. The room will be set up based on your requirements and additional equipment Will Not Be Available, nor will janitorial services be furnished at any time.

7. All reservations must be accompanied by rental fee, which is refundable for non-use if North DeKalb Mall is notified one week prior to use. Please Make Checks Payable to: North DeKalb Mall.

Contact for Organization.....

Phone: ..... Address: .....

Contact for Auditorium: ..... Phone .....

Fee: .....

Make Check Payable to:
North DeKalb Mall and
mail with application to:

North DeKalb Mall Merchants' Assoc.

2026 Lawrenceville Hwy.

Decatur, Ga. 30033

.....

(Signature for Organization)

RESPONDENT EXHIBIT 23

STATE OF GEORGIA
COUNTY OF FULTON

AFFIDAVIT

George Heald, Sr., being duly sworn, deposes and says:

1. I am the Vice President of Butler's Shoe Corporation of Atlanta, Georgia and am familiar with the facts described below.

2. On or about January 22, 1971, approximately 55 individuals employed by the Company at its warehouse located at 204 Brookwood Drive, N. E., Atlanta, Georgia, represented by Local 315 Retail, Wholesale and Department Store Union, AFL-CIO, commenced a strike against the Company. The strike resulted from a breakdown in the negotiations between the Company and the Union for a new collective bargaining agreement following the expiration of the parties' prior agreement on January 14, 1971. The Union thereafter picketed for a period of approximately 3 days at various of the Company's retail stores in the Atlanta area, including the store located at the North DeKalb Shopping Center, Decatur, Georgia, as well as at the warehouse.

3. The individuals employed at the North DeKalb Shopping Center store are employed at a different location by a different corporation (Butler's of North DeKalb, Inc.) than the warehouse employees. They are also paid on a different basis from a different payroll; are not represented by any labor organization; are separately supervised from the warehouse employees; perform primarily an entirely different function than the warehouse employees; and do not interchange on any basis with the warehouse employees. The North DeKalb Shopping Center store is one of approximately 235 facilities supplied from the warehouse.

4. Following the above-described strike, the Company and the Union entered into a new collective bargaining agreement

covering the warehouse employees which will expire on January 14, 1973.

/s/ G. Heald, Sr.
George Heald, Sr.

Sworn to and subscribed before me this 10th day of January, 1973.

/s/ Lawrence Goufried
Notary Public

My commission expires: .....

Resp. Exh. 24

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NEWSPAPERS

		Source
DECATUR-DEKALB NEWS (DeKalb County Only)		
A. Total Circulation (Audited)	70,964	SRDS
B. Cost of ½ page ad (500 inch rate) (72 column Inch)	$277.20	Rate Card
C. Cost Per Thousand	$ 3.50	
ATLANTA JOURNAL-CONSTITUTION		
A. 40 Column inch ad Cost	$508.00	Rate Card
B. Total Circulation	473,749	SRDS
C. Cost Per Thousand	$ 1.05	

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ATLANTA, GA.

Average Week TV Audience Estimates
October 26 - November 22 1972

ATLANTA, GA.

Report Schedule

Report Type

Map Legend

City Location

State Line

METRO AREA

LOCAL DMA

Adjacent DMA

See Table II for NSI Area County Lists

MARKET DATA

TABLE 1—UNIVERSE ESTIMATES-SEPT. 1972

TABLE 2—OWNERSHIP ESTIMATES

TABLE 3—SAMPLE SIZES: HOUSEHOLDS

TABLE 4—REPORTING STANDARDS & RELATED

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(26)

TELEVISION

			Source
WSB-TV	(:30 Spot in late news weeknite)		
A.	Average quarter hour audience (Total)	156,000	Neilsen
B.	Cost of :30 spot	$255.00	Rate Card
C.	Cost per thousand	$ 1.65	

WSB TV 2 (27)

P. O. BOX 4146 ATLANTA, GEORGIA 30302 PHONE: 892-3456

DATE 8/15/72

NAME AGENCY TO

KIRBY

TERMS BACK TO SCHOOL ADVERTISING

SCHEDULE							ACTUAL BROADCAST							RECONCILIATION	
DAY	RATES DROPPED START	RATES DROPPED STOP	TIME ORDERED START	TIME ORDERED STOP	RATE		RUN DAY	RUN DATE	RUN TIME	LENGTH	M/O FOR	PRODUCT/FILM NUMBER	GROSS CHARGES	IDENT	AMOUNT
												Total Adjacent			
TUE										30		-16	73,000		
TUE												-16	313,000		
WED										30		-16	100,000		
WED												-16	118,000		
WED										30		-16	113,000		
WED												-16	156,000		
THU										30		-16	100,000		
THU												-16	152,000		68
THU												-16	352,000		
THU												-16	165,000		
FRI										30		-17	100,000		
FRI												-17	87,000		

GROSS SCHEDULED AMOUNT $

NET RECONCILIATION $

TOTAL $

TOTAL GROSS CHARGES $

AGENCY COMMISSION $

NET CHARGES $

PAY THIS AMOUNT

SOURCE: AC NIELSEN NOV. 1972

WSBO TV2

P. O. BOX 4148, ATLANTA, GEORGIA 30302 PHONE: 897-3456

MAKE PAYMENT TO

DATE

TERMS OF CASH

DAY	DATES ORDERED START	TIME ORDERED STOP	TIME ORDERED START	TIME ORDERED STOP	RATE	ACTUAL BROADCAST RUN DAY	RUN DATE	RUN TIME	LENGTH	M/C FOR	PRODUCT/FILM NUMBER	GROSS CHARGES	RECONCILIATION IDENT	RECONCILIATION AMOUNT
TH	9/1	9/16	11:30P	12:00M	130.		9/16	11:30P	30		TTO-17 332,000	130.		
FRI	9/	9/	11:30P	12:00M	130.		9/17	11:30P	30		TTO-17 313,000	130.		
WED	9/1	9/16	11:30P	12:00M	65.	W	9/16	11:30P	30		TTO-10 43,000	65.		
THU	9/	9/17	11:30P	12:00M	65.	TH	9/17	11:30P	30		TTO-10 43,000	65.		
THU	9/1	9/17	11:30P	12:00M	110.	TH	9/17	11:30P	30		TTO-10 185,000	110.		
									TOTAL		2,767,000			69
									COST PER		1,000 = 3.71			

GROSS SCHEDULED AMOUNT $ 130.

NET RECONCILIATION $ .00

TOTAL $ 130.

WE HEREBY CERTIFY THAT THE TIMES AND DATES ARE IN THE SAME SEQUENCE AS SHOWN ON THE OFFICIAL STATION LOG.

TOTAL GROSS CHARGES $ 130.

AGENCY COMMISSION $ 19.50

NET CHARGES $ 110.50

PAY THIS AMOUNT

70
Rep. Exh. 28

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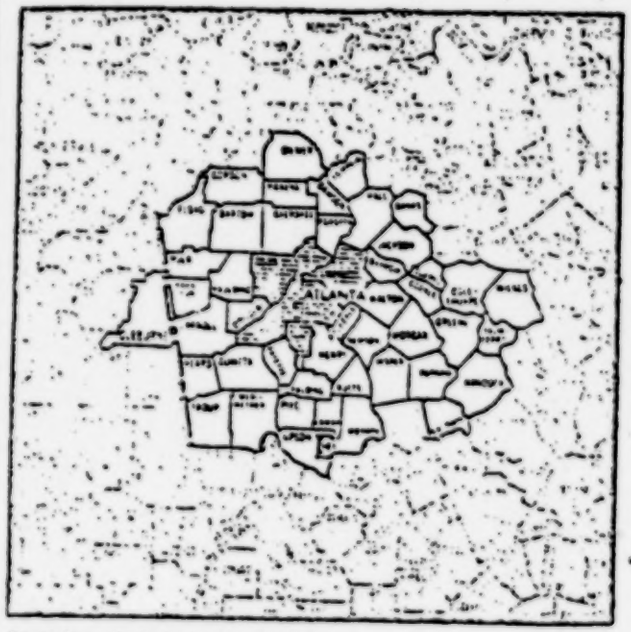

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1. Map—The area in which the listening data were gathered for this survey in this radio market is shown on the map. The Total Survey Area (TSA) of this market is shown in white. The Metro Survey Area (MSA) is shown by cross hatching. (For definitions of TSA and MSA, see Par. 9, 17.)

2. Tabulated Diaries by Sampling Unit—The number of in-tab diaries for each sampling unit is listed.

3. Special Interviewing Techniques—Special interviewing techniques are applied in certain sampling units in some markets. Sampling units in which these techniques have been implemented are indicated: "TR"—Telephone Retrieval; "PR"—Personal Retrieval. (For explanation of these techniques, see Par. 21.)

TABULATED DIARIES BY SAMPLING UNIT

	IN-TAB	COUNTIES IN SAMPLING UNIT
*	96	GWINNETT,GA
*	243	DE KALB,GA
*	44	CLAYTON,GA
*	199	COBB,GA
(TR)*	319	FULTON,GA
	29	BARROW,GA JACKSON,GA WALTON,GA
	29	BLITT,GA GREENE,GA JASPER,GA MORGAN,GA OCONEE,GA PUTNAM,GA
	35	HENRY,GA NEWTON,GA ROCKDALE,GA
	38	CLARKE,GA COLLETON-CAPE,GA
	32	BALDWIN,GA HANCOCK,GA TALIAFERRO,GA WILKES,GA
	29	SPA.DING,GA
	35	LAMAR,GA MERIWETHER,GA PONRDE,GA PIKE,GA UPSON,GA
	32	HEARD,GA TROUP,GA
	29	COWETA,GA FAYETTE,GA
	8	CARROLL,GA
	41	CLEBURNE,AL HARALSON,GA POLK,GA
	25	DOUGLAS,GA PAULDING,GA
	19	BANKS,GA HALL,GA
	66	FLOYD,GA GILMER,GA GORDON,GA
	42	BARTOW,GA CHEROKEE,GA DAWSON,GA FORSYTH,GA LUMPKIN,GA PICKENS,GA
	2,336	TOTAL
	2350	TOTAL "TR" IN-TAB

*METRO SAMPLING UNIT

SOURCE: American Research Bureau

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POPULATION ESTIMATES AND SAMPLE DISTRIBUTION BY SEX-AGE GROUP

		Estimated Population	Estimated Population as Percent of Total Persons 12+	Percent of Unweighted In-Tab Sample	Percent of Weighted In-Tab Sample
TOTAL SURVEY AREA					
Men	18-24	164,888	8.5	5.2	8.5
Men	25-34	194,223	10.1	7.6	10.1
Men	35-49	198,933	10.3	11.7	10.3
Men	50-64	142,603	7.4	7.9	7.4
Men	65+	89,783	3.6	3.7	3.6
Women	18-24	189,868	9.8	6.9	9.8
Women	25-34	198,588	10.3	11.1	10.3
Women	35-49	207,488	10.8	14.7	10.8
Women	50-64	165,783	8.6	10.2	8.6
Women	65+	117,988	5.9	5.8	5.9
Teens	12-17	284,188	14.7	15.3	14.7
Total Persons	12+	1,927,883			
METRO SURVEY AREA					
Men	18-24	138,238	8.7	5.4	8.7
Men	25-34	175,828	11.1	8.9	11.1
Men	35-49	171,698	10.5	13.8	10.5
Men	50-64	78,528	6.8	7.7	6.8
Men	65+	33,438	2.9	2.9	2.9
Women	18-24	219,788	13.4	8.7	13.4
Women	25-34	181,588	11.4	11.1	11.4
Women	35-49	175,428	10.9	15.8	10.9
Women	50-64	91,888	7.8	9.9	7.8
Women	65+	58,388	5.1	3.9	5.1
Teens	12-17	166,788	14.4	15.8	14.4
Total Persons	12+	1,153,888			

DIARY PLACEMENT AND RETURN INFORMATION

Residential Listings in Designated Sample	3,489
Total Contacts (Homes in which telephone was answered)	3,424
Homes in which Diaries Were Placed	3,162
Individuals Who Were Sent a Diary	2,743
Individuals Who Returned a Usable Diary (In-Tab)	1,338

TOTAL TABULATED DIARIES AND EFFECTIVE SAMPLE BASES

	Total Tabulated Diaries	Effective Sample Bases
Total Survey Area	1,338	1,858
Metro Survey Area	895	748

4. Population Estimates—Population estimates and sample distribution by sex-age groups are shown for this market's TSA and MSA. These population estimates are based upon 1970 U.S. Bureau of the Census estimates updated and projected to January 1, 1973 by Market Statistics, Inc., based on data from Sales Management's 1972 "Survey of Buying Power."

Also shown is the percent of usable diaries (in-tab) received from each sex-age group. These percentages are shown as both weighted and unweighted figures. (For an explanation of ARB weighting procedures, see Par. 23.)

5. Diary Placement, Return and Tabulation Data—The accompanying tables show the number of residential listings in the computer-drawn sample, the number of such listings in which the telephone was answered, the number of homes in which diaries were placed, the number of individuals who were sent a diary, the number of individuals who returned a usable diary and the Effective Sample Bases. (For explanation of Effective Sample bases, see Par. 25.)

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RADIO

WSB-RADIO (12 :60 Spot in Tap Plan -Attached)

		Source
A. Average quarter hour audience (Total persons 12 years of age and older in total survey area)		ARB
WSB-AM	486,400	
WSB-FM	131,400	
Total	617,800	
B. Total Cost (12 spots)		
WSB-AM	$783.00	
WSB-FM	216.00	
Total	$999.00	
C. Cost Per Thousand	Less than $1.70	

NATIONAL LABOR RELATIONS BOARD
Case No 10-CA-8923
Resp. OFFICIAL EXHIBIT NO. 29
In the Matter of Scott Hudgens
Date 3/1/23 Witness
By
No. Pages 3

BROADCAST AGREEMENT

WSB-RADIO

1601 WEST PEACHTREE ST., N.E.
ATLANTA, GEORGIA 30309

Member National Association of Broadcasters

DATE January 22, 1973 pa

SALESMAN Frank Stiteler

ACCOUNT NORTH DEKALB MALL

PRODUCT Antique Show

TIME BUYER David Dockel

AGENCY David Dockel & Associates
2026 Lawrenceville Highway

ADDRESS Decatur, Georgia 30033

Date of First Broadcast January 24, 1973 | Date of Last Broadcast January 27, 1973

TYPE OF SERVICE AND SCHEDULE:

60 SECOND ANNOUNCEMENTS

WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
10-12N	10-12N	10-12N	6-10AM
1-3PM	1-3PM	1-3PM	10-12N (2 spots)
3-7:30PM	3-7:30PM	3-7:30PM	

Order Card No. 22 Contract Year 1/24/73 Billing Rate 12 TR Consecutively 1-51 wks

PER PROGRAM	SPECIAL CHARGES	TOTAL WEEKLY COST
AA 0 $103.00 A 0 $ 73.00 B 0 $57.00		$703.00

TOTAL FOR CONTRACT $783.00 XXXX less 15% AGENCY COMMISSION less NO COMMISSION

By [signature]

ADVERTISER OR AGENCY DAVID DOCKEL & ASSOCIATES

By

BROADCAST AGREEMENT

The STEREO Voice of the South

wsb-fm

99.5 Megacycles

1601 WEST PEACHTREE ST., N.E.
ATLANTA, GEORGIA 30309

Member National Association of FM Broadcasters

DATE January 17, 1973

SALESMAN Frank Sinclair

ACCOUNT NORTH DEKALB MALL

PRODUCT [illegible]

TIME BUYER David Ockel

AGENCY David Ockel & Assoc.

ADDRESS 2025 Lawrenceville Highway
Decatur, Ga. 30033

Date of First Broadcast January 24, 1973 | Date of Last Broadcast [illegible]

DAYS OF SERVICE AND SCHEDULE

CO SECOND ANNOUNCEMENTS

WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
6-10AM	6-10AM	6-10AM	6-10AM
10-1PM	10-1PM	10-1PM	10-1PM (2)
3-7PM	3-7PM	3-7PM	

Ord No. 10 Contract Year 1/21/73 Billing Rate 12-TR Consecutively [illegible]

PER BROADCAST	SPECIAL CHARGES	TOTAL WEEKLY COST
$10.00		$216.00

TOTAL FOR CONTRACT $216.00 XXX LESS 15% AGENCY COMMISSION [illegible]

Accepted by WSB-FM

By [signature]

ADVERTISER OR AGENCY DAVID OCKEL & ASSOC.

By [illegible]

Subject to conditions on back hereof and any conditions attached hereto.

[1] BEFORE THE NATIONAL LABOR RELATIONS BOARD

Tenth Region

• • (Caption—10-CA-8823) • •

The above-entitled matter came on for hearing, pursuant to Notice, at 10:00 o'clock, a.m., Before:

Thomas Ricci, Administrative Law Judge.

Appearances:

Lawrence M. Cohen, Esq., Lederer, Fox and Grove, 111 West Washington Street, Chicago, Illinois 60602.

and

C. Dale Harman, Esq., Jones, Bird and Howell, Haas-Howell Building, Atlanta, Georgia 30303, both on behalf of the Respondent, Scott Hudgens.

Guy H. Dickinson, Regional Director, Retail, Wholesale and Department Store Union, AFL-CIO, 1838 Stewart Avenue, S. W., Atlanta, Georgia 30315, appearing on behalf of the Charging Party.

[2] Sylvio L. Mascotti, Esq., Room 710, 730 Peachtree Street, N. E., Atlanta, Georgia 30308, appearing on behalf of the General Counsel.

• • • • •

[4] PROCEEDINGS

Judge Ricci: On the record.

This is a formal hearing before the National Labor Relations Board, the case called Scott Hudgens, 10-CA-8823.

As we all know, this case went to the Court originally on a stipulated set of facts, reached the Circuit Court on the formal documents that everybody has in the litigation up to this point. It is not necessary to make formal exhibits here.

There came a time when the case was back in the Board's hands but a motion to offer testimony was made and granted and the Board directed a hearing. That is why we are here today.

My name is Thomas Ricci (spelling) R-i-c-c-i.

Mr. Mascotti, will you please make your appearance for the General Counsel?

Mr. Mascotti: Sylvio L. Mascotti, Attorney, 730 Peachtree Street, Atlanta, Georgia.

Judge Ricci: Mr. Cohen.

Mr. Cohen: I would like to enter two appearances for the company, Lawrence M. Cohen, of the firm of Lederer (spelling) L-e-d-e-r-e-r, Fox (spelling) F-o-x, and Grove (spelling) G-r-o-v-e, 111 West Washington Street, Chicago, Illinois 60602. And also the appearance of C. Dale Harman, (spelling) H-a-r-m-a-n of the firm of Jones, Bird and Howell, Haas-Howell Building, [5] Atlanta, Georgia 30303.

Judge Ricci: Does anyone else wish to enter an appearance? Go ahead, sir.

Mr. Dickinson: The Union, Charging Party, Guy H. Dickinson, Regional Director, Retail, Wholesale and Department Store Union, AFL-CIO, 1838 Stewart Avenue, Southwest, Atlanta, Georgia 30315.

• • • • •

[7] RONNIE HOLMES was called as a witness, by and on behalf of the General Counsel, and, having been first duly sworn, was examined and testified as follows:

Judge Ricci: What is your full name?

The Witness: Ronnie Lee Holmes.

Judge Ricci: Where do you live?

[8] The Witness: 3680 Gardner Road, Apartment A-12, Atlanta, Georgia.

Direct Examination

Q. (By Mr. Mascotti): Mr. Holmes, speak up good and loud and a little slower so we can all understand you.

A. All right.

Q. Are you presently employed, Mr. Holmes?

A. Yes, sir.

Q. By whom?

A. Butler Shoe Company.

Q. Where?

A. At 204 Brookwood Drive.

Q. Is that a store or warehouse?

A. Warehouse.

Q. You are employed by the Butler Shoe Company at the warehouse?

A. Yes, sir.

Q. Now, how long have you been employed there?

A. Three years.

Q. Do you recall back in January 1971 when the Retail Clerks Union had a dispute with Butler Shoe Company?

A. Yes, sir.

Q. Were you engaged in that labor dispute?

A. Yes, I was.

Q. What did you do in regard to that labor dispute?

[9] A. I was assigned to picket.

Q. Where were you assigned to picket?

A. In North DeKalb Mall.

Q. Who was in North DeKalb Mall that you were instructed to picket?

A. I don't understand the question.

Q. Who was at the Mall, what store?

A. Butler's Shoe Store.

Q. Butler's Shoe Store at the DeKalb Mall?

A. Yes, sir.

Q. Did you go out there to picket?

A. Yes, sir.

Q. Who did you go there with?

A. Roger Long, Tyrone Taylor and Harold Glenn.

Q. What time in the morning did you get there?

A. About 9:30.

Q. Did you start picketing right away?

A. No, sir.

Q. What happened?

A. The store was closed and we decided to wait until it opened before we started to picket, so we sat down on the bench.

Q. Did you have picket signs with you?

A. Yes, sir.

Q. Do you recall what the picket sign read?

[10] A. I couldn't recall all of it, only that Butler Shoe Company is on strike, that's all I could recall on that.

Q. All right. Did anything happen while you were sitting there at the bench?

A. Yes. We were approached by a man that said that we could not picket in this mall because it was private property.

Q. You could or could not?

A. Could not.

Q. Could not picket in the Mall?

A. Yes.

Q. Who was this man, do you know?

A. I don't remember his name.

Q. Did he tell you who he was?

A. Yes, he said his name, he said he was the owner of the shopping mall.

Q. What else did he tell you?

A. He said that we couldn't picket on any side of the mall and we couldn't picket in the parking lot. He said if we wanted to picket we had to go out on the highway to picket.

Q. Did he say that you could picket at the doors of the Mall?

A. No, sir; he didn't say no where on his property, that included everything inside the Mall and outside up to the highway.

Q. Are you acquainted with that North DeKalb Shopping Center?

A. Yes.

[11] Q. Do you know what streets it is between?

A. The only thing I know, it's on the Lawrenceville Highway.

Q. And North DeKalb Street?

A. North DeKalb Street.

Q. Do you know how many entrances there are from the street to the shopping center?

A. No, I don't.

Q. But you know that in order to get to the Mall from Lawrenceville Highway you have to get in from Lawrenceville Highway, at least?

A. Yes.

Q. How far is the Mall from Lawrenceville Highway, would you say?

A. About 500 feet.

Q. 500 feet. After the man told you you could not picket, what else did he say?

A. He said that if we would not leave he would be forced to have us arrested.

Q. Did you leave then, when he threatened to arrest you?

A. No.

Q. What happened?

A. We got in contact with our union representative to see what we should do.

Q. What were you told?

A. We were told to stay there for a while, and then later [12] they told us that we had to leave, you know, go ahead and leave.

Q. Did you at any time picket the Butler's Shoe Store?

A. Yes, for about 15 minutes.

Q. When you were picketing the Butler's Shoe Store, were you walking in front of the door of the Butler's Shoe Store? How long of a way did you picket in front of the store?

A. I'd say about 20 feet.

Q. Was there any disturbance, any violence?

A. No.

Q. Did you see any customers go in the store or out of the store?

A. No.

Q. The store had opened after you started picketing or before you started picketing?

A. It had opened after we started picketing—I mean, before we started picketing it was already open.

Mr. Mascotti: I have no further questions of this witness.

* * * * *

[13] Q. (By Mr. Cohen): Mr. Holmes, how many employees were there at Butler's warehouse that were on strike?

A. On strike?

Q. Yes, in January of 1971.

A. It was the whole company, I would say about 51 men in all.

[14] Q. Did other employees have picket duty at other stores of Butler Shoe Company besides the one at North DeKalb Mall?

A. Yes.

Q. So that people were picketing at a lot of different locations?

A. They were picketing.

Q. Were they picketing at the warehouse too?

A. Yes.

Q. How many employees went to the Butler's Shoe Store at the North DeKalb Mall?

A. It was four assigned to go there.

Q. Was Mr. Roger Long there?

A. Yes.

Q. Was Mr. Harold Glenn there?

A. Yes.

Q. Was Mr. Tyrone Taylor there?

A. Yes.

Q. How about Mr. DeWitt Freeman?

A. Yes, he was also there.

Q. So there were five employees altogether there.

A. They came after we got in contact with our union representative.

Q. So at the time you actually were picketing were there five pickets?

A. There were four pickets at the time we picketed.

[15] Q. Of the—There were five people there at various stages?

A. Yes.

Q. Were there approximately the same number of pickets at the other stores?

A. No, there wasn't, it varied.

Q. I'm sorry.

A. It varied as to how large the store was or how small it was.

Q. From what was the lowest number to what was the largest number?

A. We tried to have at least two.

Q. How many would have the maximum, what would be the largest number you would have?

A. Four, four was the largest number.

Q. Were there also pickets at the warehouse?
A. Yes.
Q. How many pickets were at the warehouse?
A. I couldn't tell you.
Q. An approximation?
A. It would have to be at least four, at least four.
Q. Do you know how many other stores they were picketing at?
A. We picketed all the stores, of Butler's Shoes and Zayre, they picketed all of them.
Q. Would that be all the stores Butler has according to the phone book? One, two, three—nine stores located in the [16] greater Atlanta area, were they picketing all the stores?
A. All of them.
Q. All those nine stores. Do you know how long the picketing went on?
A. Five days, I believe.
Q. Five days. Were the pickets paid in any way by the Union for their services?
A. No.

* * * * *

Q. This was picketing, by the way, that came up because the [17] company would not sign the contract the union wanted, there were negotiations and they broke down?
A. Yes, sir.
Q. There was no agreement on a contract and the union went out on strike?
A. Yes.
Q. And the signs that you carried, as far as you remember, said only Butler Shoe was on strike?
A. There was some more on the sign but that is the only thing I can remember that I had on my sign, the one that I carried.
Q. Have you ever worked at the store at North DeKalb?
A. No.

Q. Has anybody at the warehouse, as far as you know, ever gone over and worked at that store?
A. Not of my knowledge.
Q. Have you ever sold shoes?
A. No.
Q. Have you ever worked in any retail store of Butler Shoe Company?
A. No, only at the warehouse.
Q. Do you know any of the people who worked at the shoe store at that time?
A. At that time?
Q. Yes. Did you know any of the—let's say any employees [18] or the supervisors?
A. At North DeKalb Mall?
Q. Yes.
A. No, I didn't know them.
Q. And none of the supervisors from there ever came over to supervise you in any way, or none of the people working in the store ever came over to supervise you?
A. Not to my knowledge.
Q. You indicated that when you first came over to the store in the North DeKalb Mall you were not picketing right away. Could you tell me what you were doing at that time?
A. Well, like I said, when we arrived at the Mall it was about 9:30 and the store wasn't open, so we sat on the bench to wait until the store opened, so we were just sitting there.
Q. Were you sitting—This is a bench that has been put up in the middle of the aisleways of the Mall?
A. Yes.
Q. You went into the building, when we call it the Mall you are referring to the enclosed building there?
A. Right.
Q. You went into that building and sat down on these benches that were placed there.
A. Right.

Q. Was there anything there besides benches, were there any planters that you remember, or anything else?

[19] A. Any plants?

Q. Yes.

A. I think there was a cafeteria, little cafeteria in the Mall, I believe.

Q. Now, how many people were sitting there at that time?

A. It was, I think, me and Tyrone, Tyrone Taylor and Harold Glenn were sitting there.

Q. Did you have your picket signs with you?

A. Yes, we had them.

Q. They were normal picket signs, poles with a placard at the top of the pole?

A. Yes, sir.

Q. What did you do with those signs?

A. After the strike we disposed of them.

Q. I'm saying what did you do when you were sitting, did you have them sitting next to you or did you put them over next to the store?

A. I had mine, you know, sticking between my legs holding it.

Q. Were some of them put against the window of the store?

A. No, not at the store.

Q. The only time—You either had them next to you or when you were marching up and down?

A. Right.

Q. You had them in your hand at that time. Now, the gentleman, you said after you were there for how long somebody came up to [20] you from the center.

A. Right.

Q. How long had you been there at that time?

A. I'd say about a half an hour.

Q. You had not been actually picketing though?

A. No, sir.

Q. Was the gentleman who came up to you this man who is sitting next to me?

A. Yes, sir.

Mr. Cohen: The record shows Mr. Douglas Ballard, general manager of the center.

Now, did he talk to each person individually or did he talk to you as a group?

The Witness: He was speaking to us as a group.

Q. (By Mr. Cohen): Did Mr. Ballard in that conversation tell you that he was sorry he could not—he sympathized with you, he was sorry he could not help you but this was private property and you were not allowed to picket on that property?

A. Yes.

Q. And did he ask you to leave or did he say you are going to be arrested right away, what was the first thing?

A. He said if we stayed there and picketed he would be forced to have us arrested.

Q. The Butler's Shoe Store is located in a corner of one of the buildings inside the Mall, is that correct?

[21] A. Yes, sir.

Q. Were there pickets marching on both sides of that store?

A. Yes, sir.

Q. And did they picket all the way from the store, at one side of Butler's Shoe Company, down to the corner and then across in front of the frontage of the store to the store on the other side?

A. It was two men on each side.

Q. Two men on each side, and they walked together or did they walk one in front of the other?

A. It was—Well, one was at one end and they met up.

Q. Did they walk—Let's see if we can describe this for the record. You had one person walking one way and another person walking the other way, they were both walking in parallel lines in front of the store.

A. Yes, sir.

Q. So that they sometimes would pass each other and then they would be right abreast of each other?

A. Yes.

Q. And they continued to go up and down in that same path?

A. Yes, sir.

Q. How many entrances were there to the Butler's Store?

A. I can think of one.

Q. Do you remember at the time you were picketing this entrance to the Butler's store, was there any goods for sale outside [22] the store?

A. No, sir.

Q. No shoe display or something of that nature?

A. Not outside the store.

Q. Were there people who tried to go into the store during that time?

A. No, sir.

Q. Nobody tried to go into the store during the time you were picketing?

A. We didn't picket but about 15 minutes.

Q. And during that time no one tried to go into the store?

A. No.

Q. Do you know whether anyone talked to Mr. Ballard after he talked to you at that point?

A. Not to my knowledge.

Q. You don't know if Mr. Long had a telephone conversation with Mr. Ballard later in the day, you would not be aware of that?

A. I would not be aware of it.

Mr. Cohen: I will mark this—

Judge Ricci: Respondent's Exhibit Number 1.

(The document referred to was marked for identification as Respondent's Exhibit Number 1.)

Mr. Cohen: Mr. Holmes, I show you what has been marked for identification as Respondent's Exhibit 1 and ask if that [23] is the Butler's Shoe Store at North DeKalb Mall that we have been talking about?

The Witness: Yes, I believe it is.

Judge Ricci: What did he say?

The Witness: I said I believe that is the one.

Mr. Cohen: Over here on the left hand side are some planters and what looks like an area, is that the area where you were sitting at the time before the picketing started?

The Witness: Yes, sir.

Q. (By Mr. Cohen): And this is a recent photograph, in fact, it was taken yesterday of that store, was there anything different about that store as it looks in this photograph and it looked at the time you actually engaged in the picketing?

A. If there is I can't remember.

Q. As far as you know this is the way it looked at the time you were there?

A. Yes.

Q. Pardon me?

A. Yes.

Mr. Cohen: I would like to offer, please, Respondent's Exhibit 1.

Mr. Mascotti: No objection.

Judge Ricci: I receive into evidence Respondent's Exhibit Number 1, the photograph.

(Respondent's Exhibit 1, heretofore marked for identification, was received in evidence.)

[24] Mr. Cohen: Just so it is clear, when we were talking about marching, you walked all the way from this corner down, two people?

The Witness: Yes.

Q. (By Mr. Cohen): And they would have walked in front of that entrance, which is the only entrance to the Butler's Store?

A. Yes, sir.

Mr. Cohen: I have no further questions.

Judge Ricci: Okay.

Mr. Mascotti: No further questions.

Judge Ricci: Thank you, sir.

(Witness excused.)

Mr. Mascotti: The next witness is Tyrone Taylor. Whereupon,

TYRONE TAYLOR, was called as a witness, by and on behalf of the General Counsel, and, having been first duly sworn, was examined and testified as follows:

Judge Ricci: What is your full name, please?
The Witness: Tyrone Taylor.
Judge Ricci: Where do you live?
The Witness: 973 Stoney Street.

Direct Examination

Q. (By Mr. Mascotti): Mr. Taylor, speak up nice and loud [25] so we can all hear you. Are you presently employed, Mr. Taylor?

A. Yes.
Q. By whom?
A. Butler Shoe Company.
Q. Where are you working?
A. On Brookwood Drive.
Q. And is that a store down there?
A. No, that's the warehouse.
Q. You are working at the warehouse. How long have you worked at Butler Shoe warehouse?
A. Three years.
Q. Do you recall back in January 1971?
A. Yes.
Q. Do you recall a labor dispute between the Retail Clerks, Wholesale, Department Store Union and the company?
A. Yes.
Q. Did you engage in that labor dispute?

A. Yes.
Q. What did you do for that labor dispute?
A. You are talking about like walking at the Mall?
Q. Yes.
A. We—
Q. Did you engage in any picketing?
A. Yes.
Q. Where were you picketing?
[26] A. At South DeKalb.
Q. Where in South DeKalb?
A. Inside the Mall.
Q. Inside the Mall. In front of what store?
A. Butler's Shoe Company.

Mr. Cohen: Just a moment, Mr. Mascotti. Is assume the witness there means the North DeKalb Mall.

The Witness: North DeKalb.
Mr. Mascotti: North DeKalb.
Mr. Cohen: There is a South DeKalb Mall.
Mr. Mascotti: We all know where we are at.
Mr. Cohen: That's what I wanted to make sure.
Mr. Mascotti: I'll ask him again.
Where were you picketing?
The Witness: North DeKalb.

Q. (By Mr. Mascotti): Shopping center?
A. Yes.
Q. In front of what store?
A. Butler Shoe Company.
Q. What time did you get there?
A. I guess maybe around about 9:30 or 10.
Q. Were you alone?
A. No.
Q. Who was with you?
A. Ronnie Holmes, Harold Glenn and myself.
[27] Q. Did you have picket signs?
A. Yes.

Q. What did they say, do you recall?

A. I don't recall, really. You know, we was on strike, you know.

Q. All right. Did each one have a sign?

A. Yes.

Q. Did you start picketing right away when you got there?

A. No.

Q. What happened?

A. It was some fellow, I done forgot what his name was, but he walked up, you know, and said we couldn't picket there because it was private property. And so we asked him, you know, how come, and he said, you know, we could go out on the highway, but we couldn't picket inside the building because, you know, it was private property.

Q. Did he tell you you could picket outside the doors of the enclosed Mall?

A. No.

Q. Did he tell you you could picket on the parking lot?

A. No.

Mr. Cohen: I'm going to object to the leading nature of the questions.

Judge Ricci: Overruled.

Did he tell you anything?

[28] The Witness: He told us we couldn't picket inside the Mall, we couldn't picket out in the parking lot but we would have to go up on the highway and picket. That's the only way we could do it. He said we could walk in the Mall but we couldn't carry the signs, period.

Mr. Mascotti: Are you acquainted with the streets out there at North DeKalb Shopping Center?

The Witness: Yes, I'm kind of acquainted.

Q. (By Mr. Mascotti): What highway runs there?

A. The Druid Hills highway.

Q. What is that known as, Lawrenceville Highway?

A. Yes.

Mr. Cohen: Mr. Mascotti—Could we be off the record a second?

Judge Ricci: Off the record.

(Discussion off the record.)

Judge Ricci: On the record.

Mr. Mascotti: To the best of your knowledge, how far is it from the Lawrenceville Highway to the Mall property, inside the enclosed Mall?

The Witness: I'd say maybe it's about, in my opinion it may be about 500, maybe 570.

Q. (By Mr. Mascotti): From the entrance at North Druid Hills Road to the Mall, that entrance, how far is it?

A. It's about a good—about 495, I'd say.

[29] Q. Did you do any picketing at all that morning?

A. No.

Q. You did not picket at all?

A. Not at all.

Q. After this man came up and told you if you picketed that he threatened to arrest you?

A. Yes.

Q. You left the Mall?

A. Yes.

Q. Where did you go?

A. We went back to the Union Hall.

Q. You did not go back again to the shopping center to picket, you yourself?

A. No.

* * * * *

Cross-Examination

Q. (By Mr. Cohen): Mr. Taylor, have you ever worked in the store for Butler's Shoes at North DeKalb Mall?

A. No.

Q. Have you ever sold shoes?

A. No.

[30] Q. Did you know any of the people who were working at the North DeKalb Store at the time?

A. No.

Q. Did you ever know any of the supervisors in that store?

A. No.

Q. Have you ever worked at any retail store of Butler Shoe Company?

A. No.

Q. Your only job has been at the warehouse?

A. Yes.

Q. What type work do you do?

A. Selector and puller.

Q. You do stock work?

A. Pull stock, yes.

Q. Pull stock. I am going to show you what is already employer's Exhibit 1, is that the Butler Shoe store at North DeKalb Mall?

A. Yes.

Q. Were you sitting over here in front of the entrance, in that area right here (indicating)?

A. No, I was standing.

Q. Where were you standing, can you show us on this picture?

A. I was standing about right along here (indicating).

Q. That is the area between the store and this planter that is over on the side, is that correct?

[31] A. That's correct.

Q. Did you have your picket sign with you at the time?

A. Yes, we had them.

Q. What did you do with the picket sign?

A. We didn't do anything with it.

Q. Did you put them up next—Did any of the employees put the signs on the window of the store?

A. No.

Q. Did you put them on the planters or just carry them in your hand?

A. Had them in our hands.

Q. By the way, is there any difference, this is a current picture of the store. Is there any difference that you can tell between that picture of how the store looks today and how it looked in 1971 when you were there?

A. No, it looks the same. That's the only time I have been out there.

Q. As far as you know this is the way it looked at that time?

A. Yes.

Q. Did you ever picket at any store of the Butler Shoe Company?

A. Yes.

Q. Which one?

A. West End.

* * * * *

[32] Mr. Cohen: Did you ever picket any other stores?

The Witness: Yes.

Q. (By Mr. Cohen): Did you ever receive any compensation for picketing?

A. No, this was the first time.

Q. You were not paid by the union during the time you were picketing?

A. No.

Q. I'm sorry, what store did you say you picketed at?

A. The first time I picketed?

Q. I'm sorrry. What I am talking about is picketing at the time of this 1971 dispute when the contract expired and there was no contract and the union went out on strike. I don't care about any other labor dispute, I am talking about that.

A. You are talking about at that time?

Q. At the time, first you went to North DeKalb Mall. I think you said you did not picket there.

A. No.

Q. You indicated, just so I am clear, in a statement to the Board, that after you came back to the union hall you went back to the North DeKalb Mall and started picketing, is that true or not true?

[33] A. Not true.

Q. You didn't wait at the union hall for about 10 minutes until a union representative called the union lawyer and then went back and picketed the Butler Shoe Store again at the North DeKalb Shopping Center, that is not true?

A. No.

Q. Did you picket at any other store of Butler Shoe Company that same day or the next day?

A. Yes.

Q. Where was that other store?

A. On Stewart Avenue.

Q. That's the Lakewood shopping center?

A. Yes.

Q. Did anyone bother you there or were you allowed to picket there?

A. We were allowed to picket there.

Mr. Cohen: I have no further questions.

Mr. Mascotti: I'd just like to clear up, if it is important at all—

Judge Ricci: I don't think it is important, if you are asking me, but use your own judgment.

Mr. Mascotti: Let me ask one question.

Redirect Examination

Q. (By Mr. Mascotti): I'd like to show you your affidavit, Mr. Taylor, is that your signature?

[34] A. Yes.

Q. When was that made out?

A. 1971.

Q. When?

A. February.

Q. Read this statement here.

Judge Ricci: You asked him.

Mr. Cohen: I didn't try to impeach him.

(Brief pause.)

The Witness: Uh-huh.

Mr. Mascotti: Does that refresh your memory?

The Witness: Yes.

Judge Ricci: What are you going to ask him?

Mr. Mascotti: Did you or did you not go back after you were at the union hall and picket?

The Witness: Yes, we went back.

Q. (By Mr. Mascotti): How long did you picket there?

A. We didn't picket there, period.

Q. After the union hall when you went back, didn't you picket for five or ten minutes?

Judge Ricci: Now wait a minute, be fair to the witness.

Mr. Taylor, the first question is, after you went to the union hall, did you ever go back to the shopping center to picket in front of that store inside the covered Mall?

The Witness: Yes, we went back.

[35] Judge Ricci: You went back for a while?

The Witness: Yes, for a while.

Judge Ricci: Then you left again?

The Witness: Yes.

Judge Ricci: What else do you want to ask him?

Mr. Mascotti: Did you picket at the time you went back?

The Witness: We picketed a little while, and then we left.

Mr. Cohen: I have a question now.

Judge Ricci: Yes, of course.

Recross Examination

Q. (By Mr. Cohen): When you went back to picket there, how long did you spend picketing before you left?

A. About five minutes. Then Roger Long, he come to get us, you know, and then we had to leave.

Q. Did Roger Long come up to you and say he had just talked to somebody and you had to leave?

A. Yes.

Q. Did he tell you what happened in that telephone conversation?

A. No. Not that I can remember.

Q. All he did was say he had a conversation with somebody and you had to leave?

A. Yes.

Q. When you were picketing, were you picketing in front of the entrance to the building, on the side of the building, the [36] Butler Shoe building, Butler Shoe store?

A. I was picketing in front of the store.

Q. Again showing you Employer's Exhibit 1, Respondent's Exhibit 1, you were picketing right in front of that entranceway?

A. Yes.

Q. How many people were picketing there?

A. There were three of us.

Q. Three you you were walking up and down?

A. Uh-huh.

Q. Mr. Holmes who was here before said you were marching along parallel, one was walking one way and one was going the other, is that correct?

A. That's true.

Q. And three of you were marching parallel to the store?

A. There was two on one side and one on the other side.

Q. So two of you were in the front part of the store?

A. Two was on the side and one was on the front part.

Q. Did anybody try to enter the store that you remember?

A. No, not that I can remember.

Q. Did you see any people, customers in the Mall at the time?

A. Yes, I think there was.

Q. But no one tried to go into the Butler's Shoe store?

A. Not at that time.

Mr. Cohen: I have no further questions.

* * * * *

[37] Mr. Mascotti: The next witness, Harold Glenn. Whereupon,

HAROLD GLENN, was called as a witness, by and on behalf of the General Counsel, and, having been first duly sworn, was examined and testified as follows:

Judge Ricci: What is your name?
The Witness: Harold Glenn.
Judge Ricci: What?
The Witness: Harold Glenn, Harold Keller Glenn.
Judge Ricci: Where do you live, sir?
The Witness: 837 Bolton Place.

Direct Examination

Q. (By Mr. Mascotti): Mr. Glenn, speak up nice and loud so we can all hear you, and take your time. Are you presently [38] employed, Mr. Glenn?

A. Yes, sir, Butler's Shoes.

Q. Where?

A. 204 Brookwood Drive.

Q. Is that a store or warehouse?

A. Warehouse.

Q. How long have you been employed at Butler Shoe warehouse?

A. 21 years.

Q. How many?

A. 21 years.

Q. Do you recall back in January of 1971?

A. Yes, sir.

Q. Did you engage in any labor dispute at that time?

A. Yes, sir.
Q. What was your part in the labor dispute?
A. We went on strike for more money.
Q. Did you picket?
A. Yes, sir.
Q. Where did you picket?
A. North DeKalb Mall.
Q. Were you picketing alone or who was with you?
A. Ronnie Holmes, Tyrone Taylor and DeWitt Freeman.
Q. What time of day did you go out there to picket?
A. About 9:30 in the morning.
Q. Did you have picket signs with you?
[39] A. Yes, sir.
Q. Do you recall what they said?
A. Butler Warehouse is on strike, AFL-CIO, Local 315.
Q. When you first got at North DeKalb Mall, did you do any picketing?
A. No, sir; we were sitting down on the bench.
Q. Tell us what happened at this time.
A. We were sitting on the bench waiting for the store to open, so the store never did open so we couldn't picket. Some fellow came up and told us we couldn't picket in the Mall. That we couldn't picket in the parking lot because it was private property, we couldn't picket in the Mall because it was private property, that he owned that property. If we was going to picket, to get up on Lawrenceville Highway.
Q. Did he tell you anything else?
A. That he was going to have us arrested if we didn't leave the building, didn't leave the Mall.
Q. Did you leave the Mall then?
A. Yes, we left the Mall and went back to the union hall and come back.
Q. When you came back to the Mall after being at the Union Hall, what did you do then?
A. We picketed about 30 minutes, I think.

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[40] Q. Do you know how far it is from Lawrenceville Highway to the Mall proper?
A. I used to shoot a little golf and I would say it's about 500 feet.
Q. Do you know how far it is from the entrance at North Decatur Road to the Mall property?
Mr. Cohen: North Druid Hills.
Mr. Mascotti: North Druid Hills.
The Witness: About a tenth of a mile.

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Cross-Examination

[41] Q. (By Mr. Cohen): Mr. Glenn, have you ever worked at the store in the North DeKalb Mall?
A. No, I ain't.
Q. Have you ever worked in any retail store of Butler Shoe Company?
A. No.
Q. What is your job at the warehouse?
A. Working foreman, lead man.
Q. You do warehouse work?
A. Right.
Q. Did you know in 1971 any of the people working, supervisors or employees, at the retail store in the North DeKalb shopping center?
A. I don't know by name, by face.
Q. Have you ever worked with any of them?
A. No.

• • • • •

[42] Q. You say then somebody came up to you, was that this gentleman sitting here, Mr. Ballard, is this the same man?
A. I can't recall.
Q. Whoever it was came up to you and said you could stay there but you just couldn't picket?

A. He said, you can stay but those signs have got to go

Q. Those were the picket signs?

A. Right.

Q. He didn't tell you you couldn't shop there, did he?

A. No.

Q. Then you said later on you came back and started actually [43] picketing.

A. Right.

Q. Were you picketing in front of the building?

A. We had two on this side and two on the other side.

Q. Two on each side of the building?

A. Right.

Q. And you were marching parallel to each other?

Judge Ricci: On each side of the store.

Mr. Cohen: I'm sorry, on each side of the store, thank you.

The Witness: Each side of the store.

Q. (By Mr. Cohen): Were you marching up and down in front of the entrance?

A. Right.

Q. Did anyone try to enter the store?

A. I don't recall that.

Q. You don't know if somebody did or not?

A. No.

Q. Were there customers in the Mall at the time, other people there?

A. Right.

Q. Now, Mr. Long came up to you later on and said that you had to leave. Told you he had a conversation with someone and you had to leave?

A. Right.

Q. Did he say who he had a conversation with? [44]

A. He had a phone call.

Q. Did he tell you who this phone call was with?

A. He said the owner of the Mall.

Q. He talked to the owner of the Mall?

A. Right.

Q. Did he tell you what his conversation was with the owner of the Mall?

A. He just said, "we'd better go before we get arrested".

Q. That's all he said?

A. (Witness nodded affirmatively.)

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Mr. Mascotti: General Counsel has no further witnesses.

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[45] Whereupon, DOUGLAS C. BALLARD was called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

Judge Ricci: Please give your full name and home address for the reporter.

The Witness: Douglas C. Ballard, 4568 Riverwood Circle, Decatur, Georgia 30034.

Direct Examination

Q. (By Mr. Cohen): Mr. Ballard, you are the same Douglas Ballard who was General Manager of North DeKalb Shopping Center who gave a statement to the Board which is Exhibit 4 at the time of the previous consideration of this case?

A. Yes, sir.

Judge Ricci: What statement are you talking about? The [46] stipulation of fact?

Mr. Cohen: Exhibit 4 to the stipulation.

Judge Ricci: The stipulation of fact?

Mr. Cohen: Exhibit to the stipulation.

Judge Ricci: A part of the stipulation?

Mr. Cohen: A part of the stipulation.

Judge Ricci: Okay.

Mr. Cohen: Are you still the manager of North DeKalb Shopping Center?

The Witness: No, sir.

Q. (By Mr. Cohen): When did you stop being the manager?

A. About a week ago, sir.

Mr. Cohen: Would you please mark this, this would be number 2.

Judge Ricci: Off the record.

(Discussion off the record.)

Judge Ricci: On the record.

There has been marked for identification number 2 exhibit of the Respondent, a road map of Atlanta and its environs. On it there is marked in black ink a little square with the letters NDC in the middle of the square, and there are also marked on this map eight letters B in black, or nine, however many there are. Each place where there is a "B" means that at that place on this map the Butler Shoe Company has a retail store. We will note that one of them is near the "NDC". I think that is [47] the one inside the shopping center.

Mr. Cohen: That's correct.

Judge Ricci: Respondent offers this. In order that it will add to the record whatever information appears on this map, on this exhibit, both distances, mileage, location of stores. Do you agree, Mr. Mascotti?

(The document referred to was marked for identification as Respondent's Exhibit 2.)

Mr. Mascotti: I have no objection.

Judge Ricci: That this map faithfully, fairly faithfully reflects where the various retail stores are?

Mr. Mascotti: Yes, sir.

Judge Ricci: It is okay to take it in evidence?

Mr. Mascotti: Right.

Judge Ricci: With that understanding as to the markings on it, I receive into evidence Respondent's Exhibit Number 2.

(The document heretofore marked as Respondent's Exhibit 2 was received in evidence.)

Mr. Cohen: Mr. Ballard, that map shows where the North DeKalb Shopping Center is. Is that a residential, primarily residential or primarily commercial?

The Witness: Primarily residential.

Q. (By Mr. Cohen): And the customers of the North DeKalb Shopping Center come from the entire Atlanta area as shown on this map?

[48] A. Yes, sir.

Q. And does the North DeKalb Shopping Center advertise in the area shown on the map, the Greater Atlanta area?

A. Yes, sir.

Q. The map is Exhibit 2 that was just received. How many acres is North DeKalb Shopping Center?

A. 55.

Q. Now this has been described as a building, a mall building with parking spaces around it. How many different parking spaces are there?

A. 2,640.

Mr. Cohen: May we be off the record?

Judge Ricci: Off the record.

(Discussion off the record.)

Judge Ricci: On the record.

There has been marked for identification an exhibit 3 of the Respondent. It is a plot drawing prepared in some fashion of the shopping center in question, and a close look at it shows that it is an enlargement of the central portion of what is already part of this record as Exhibit 2 attached to the original stipulation of fact. As we look at it we can see because it is exactly like the central portion of that exhibit. What we have in number 3 is a drawing of the buildings standing in 1971 at the time these things happened in the shopping center. Okay?

* * * * *

[49] Judge Ricci: Yes. And I receive into evidence with that understanding Respondent's Exhibit Number 3.

The document referred to, theretofore marked Respondent's Exhibit 3, was received in evidence.)

Mr. Cohen: Mr. Ballard, showing you Exhibit 3, there are various numbers next to sections of that. What are those numbers?

The Witness: These numbers?

Q. (By Mr. Cohen): Yes, 20—

A. Those are store numbers, they are different stores and we just number the stores rather than put the name there.

Q. Number 19 which has a black line around it, is what store?

A. That's Butler's Shoe Store.

Q. There are also circles drawn at four locations. What are those circles?

A. Those are the four main entrances to the shopping center.

[50] Q. To the Mall building and the center?

A. Yes, sir.

Q. There is an open space. What is that open space shown between the circles?

A. That is the Mall section. This is the covered Mall section and the aisleways of the shopping center.

Q. Is there any difference between those, for purposes of the record, between that building as shown in this diagram and as it exists today?

A. Yes, there is.

Q. What is that difference?

A. There is another Mall aisleway section—

Q. Proceeding up number 30?

Judge Ricci: What do you mean Mall highway section?

The Witness: Aisleway.

Judge Ricci: An aisle where the public—you have said that what looks like an open area without any numbers in it in the middle of this is where people walk.

The Witness: Yes.

Judge Ricci: A walking area.

The Witness: Yes, sir.

Judge Ricci: Now you say another one has been built since the time of the events, up along between, say 28 store and 30, those two stores, going outside.

The Witness: Yes, sir.

[51] Mr. Cohen: That was built after the picketing involved here?

The Witness: Yes, sir.

Q. We have not mentioned previously, but how many entrances are there to the parking lot of the shopping center?

A. Five.

Q. What streets do those shopping center entrances appear on?

A. North Druid Hills Road, Lawrenceville Highway.

Q. Those are all five entrances? May I borrow this for a second?

Judge Ricci: Sure.

Mr. Cohen: Looking at Exhibit 2, this is Exhibit 2 attached to the previous stipulation, can you tell us where those entrances are?

The Witness: Birch Road entrance, Oak Tree Drive entrance, Mistletoe Road—

Judge Ricci: Are you saying that what seems to be a straight line, straight street to which Birch Road, Oak Tree Road and Mistletoe Road approach, that long line, that's a highway?

The Witness: These—Mistletoe Road—This is the periphery of the parking lot of North DeKalb Mall. These streets right here lead to North Druid Hills Road.

[52] Judge Ricci: In other words, a person driving on Birch Road, Oak Tree Road or Mistletoe Road enters that street and goes right into the parking lot?

The Witness: That's right.

Judge Ricci: South of it there is the Lawrenceville Highway.

The Witness: Right, this is the main entrance off Lawrenceville Highway, this is a secondary entrance off Lawrenceville Highway.

Mr. Cohen: You first pointed to the middle entrance of the three entrances on Lawrenceville Highway, I'm sorry, on the north side of this diagram.

Judge Ricci: Only two of the three at the bottom of the exhibit, bottom of the sheet where it says Lawrenceville Highway, the two entrances to the right have been used and are used, the little one on the left is not an entrance.

The Witness: That's correct.

Judge Ricci: Go ahead.

Mr. Cohen: There is no direct entrance off North Druid Hills Road?

The Witness: Not directly from North Druid Hills Road into the parking lot, you have to come down Birch Road, Oak Tree Drive or Mistletoe.

Judge Ricci: Where is Druid Hills Road?

The Witness: Right here (indicating).

[53] Mr. Cohen: It's north of the center.

Judge Ricci: Just you and me.

The Witness: Yes.

Judge Ricci: On Exhibit Number 2 it doesn't say Druid Hills Road anywhere, so you tell me, are you saying that it would be off to the right of the exhibit, that a person would go from Druid Hills Road to the parkway either by going along Birch Road or he would go off Druid Hills Road and take Oak Tree Road into the parking lot, and similarly with Mistletoe Road?

The Witness: That's correct, sir.

Judge Ricci: Thank you.

Mr. Cohen: Mr. Ballard, are there any stop signs on Birch Road, Oak Tree Road or Mistletoe Road?

The Witness: Yes, sir, there is a stop sign at each one of them.

Q. (By Mr. Cohen): So that someone coming down Birch Road would have to stop before they entered the parking lot at the center?

A. Yes, sir.

Q. That would also be true of Oak Tree Road and Mistletoe Road?

A. Yes, sir.

Q. They would have to come to a complete stop?

A. Yes, sir.

[54] Q. Is there public property at that location?

A. Yes, sir, there is a right of way.

Q. At each of those different points?

A. Each one.

Q. Where someone could stand?

A. Yes, sir.

Q. Someone coming off Lawrenceville Highway, would they have to make a turn off that highway?

A. Yes, sir.

Q. Would they have to reduce their car to a slower speed—

Judge Ricci: Unless they wanted to hit a pole. When a man makes a turn, Mr. Ballard, he goes slower with his car than he does when he is on the highway?

The Witness: Yes, sir.

Judge Ricci: Of course, we all know that. What do you want to ask him.

Mr. Cohen: I think that is important testimony, Mr. Ricci. I will have further questions on that later.

I do have another exhibit I would like to introduce at this time. Mark this as Exhibit 4.

(The document above referred to was marked for identification as Respondent's Exhibit 4.)

Mr. Cohen: Mr. Ricci, again, if I might follow your suggestion and be off the record.

Judge Ricci: Off the record.

[55] (Discussion off the record.)

Judge Ricci: On the record. Number 4 is another plot plan, that is what Mr. Cohen says. It is an enlargement of the interior walkways inside the covered mall.

Mr. Cohen: As they existed in 1971.

Judge Ricci: Is that correct, Mr. Mascotti?

Mr. Mascotti: I assume, I won't dispute it.

Judge Ricci: I receive into evidence Respondent's Exhibit Number 4.

(The document referred to, heretofore marked Respondent's Exhibit 4, was received in evidence.)

Mr. Cohen: Showing you Exhibit 4, Mr. Ballard, you have marked, or somebody has marked in ink, two rectangles on that diagram. Can you tell us what those are, please?

The Witness: This first—

Q. (By Mr. Cohen): The larger of the two?

A. The larger of the two diagrams, the larger of the two squares is a kiosk.

Q. What is a kiosk?

A. A kiosk is about a 10 by 10 rectangle building or booth made from wood that is used for commercial sales or to demonstrate things, and this sort of thing.

Q. We will have some pictures of kiosks that I will introduce later.

A. Yes, sir.

[56] Judge Ricci: Where they might put Santa Claus on Christmas?

The Witness: Yes, sir, we could use it for that.

Mr. Cohen: It is used for selling items to customers too?

The Witness: Yes, sir, it sure is.

Q. (By Mr. Cohen): Is it leased property?

A. Yes, sir, it sure is.

Q. That tenants of the center have and sell products from?

A. Yes, sir.

Q. What is the smaller little rectangle up near the top of the picture that you have drawn in?

A. That is the charity booth.

Q. Is that also a smaller kiosk?

A. Yes, sir, it's a smaller kiosk.

Q. We will have testimony on what a charity booth is later on, but at this time I would like to have this in evidence.

Judge Ricci: I have received it in evidence, number 4.

Mr. Cohen: Now showing you number 4, Mr. Ballard, when you observed, just so we are clear on this, observed the pickets, at what point on this diagram were they at, if you would like to mark it with a "P" for pickets.

Judge Ricci: Wait a minute.

Mr. Cohen: Maybe you could identify the Butler Shoe Store on this diagram.

Judge Ricci: All right.

[57] The Witness: The first time I saw the pickets they were sitting on a bench—

Judge Ricci: Hold it, off the record.

(Discussion off the record.)

Judge Ricci: On the record.

Mr. Cohen: You have identified the Butler's Shoe Store as "BS". Would you put an "X" where the pickets were when you first observed them in January 1971?

(The Witness complied.)

Judge Ricci: Put a "P" next to that "X", it will mean pickets. Okay.

Mr. Cohen: What was the distance between the pickets at that point and the kiosk that you have marked with the rectangle?

The Witness: 15 feet, approximately.

Q. (By Mr. Cohen): And was that kiosk rented to a customer at the time?

A. I don't recall.

Q. How wide is the aisleway at the center as shown in Exhibit 4?

A. Approximately 40 feet. The main mall is approximately 40 feet, the side malls are approximately 30 feet.

Q. How far is it from, looking at Exhibit 3, from the entrances to the enclosed mall building designated by the circles on that diagram, to the Butler's shoe Store where the pickets were [58] on the occasion in question?

A. Approximately 50 feet.

Q. 50?

A. Yes, sir.

Mr. Mascotti: Where is the 50 feet?

Mr. Cohen: From the entrance at the top of the page to the Butler's Shoe Store.

Judge Ricci: The top of the page, Mr. Cohen, is going to cause confusion. Please, Mr. Witness, on this Exhibit Number 3 there are these four circles, which are the entrances to the covered mall from the parking lot. One of them on Exhibit Number 4 is sort of top left, in the direction—

Mr. Mascotti: Could we mark these 1, 2, 3, 4?

Judge Ricci: We will. One of the circles is in the direction toward where the Butler's Store is, number 19. The Butler's Store, we understand, has two entrances, one opening into the central long mall, and another one to the right of that entrance, right?

The Witness: Yes, sir.

Judge Ricci: The lawyer asked you what is the distance from that swinging door entrance, the circle in the upper left, to the entrance to the Butler's store.

The Witness: Approximately 50 feet.

Judge Ricci: I understand you now.

Mr. Cohen: Is the entire building shown in Exhibit 3 [59] surrounded by a sidewalk of any kind?

The Witness: Yes, sir.

Q. (By Mr. Cohen): Is this a sidewalk that is between the parking area and the building itself?

A. Yes, sir.

Q. What is the width of that sidewalk?

A. Approximately 10 feet.

Q. Is it larger at any particular location?

A. Yes, sir, it is, close to the main entrances it is approximately 25 feet wide.

Q. Those are the four entrances shown on Exhibit 3?

A. Yes, sir.

Judge Ricci: You said all sidewalks, Mr. Ballard, it is all private property. People park—Did you say 600 parking spaces marked on the parking lot?

Mr. Cohen: 2,600.

Judge Ricci: 2,600. A person gets out of his car, he walks into the building, right?

The Witness: Yes, sir.

Judge Ricci: He is walking, when he gets off that area where the concrete is marked for parking cars, he is off the parking area, at least he is off where it is painted on the floor, right?

The Witness: Yes, sir.

Judge Ricci:. He has got to walk the distance to one of [60] the entrances to go into the building.

The Witness: Yes, sir.

Judge Ricci: Is there any difference what he is walking on the first 10 feet, the second 20 feet, the next 5 feet?

The Witness: Sure is.

Judge Ricci: Keep asking, sir.

Mr. Cohen: All right, taking the parking lot, is this a paved parking lot?

The Witness: Yes, sir.

Q. (By Mr. Cohen): It has striped places for cars?

A. Yes, sir.

Q. By the way, who paved and striped that parking lot?

A. Scott Hudgens Company.

Q. Are there lights in the parking lot?

A. Yes, sir.

Q. Who erected those lights?

A. Scott Hudgens Company.

Q. Who maintains the lights?

A. Scott Hudgens Company.

Q. When you leave the parking lot area where cars can traverse and you proceed toward the mall building, you indicated there is a sidewalk there. Is this a sidewalk that would be any different from the sidewalk, public sidewalk outside this building?

A. No, sir, there is no difference other than we maintain [61] the sidewalk at all times. We keep it clean, we pave it, we put it in, this sort of thing.

Q. But it is a cement sidewalk of the same type used on city streets?

A. Yes, sir, it is even raised.

Q. Then you would enter the building through one of these four doors.

A. Yes, sir.

Q. These are swinging doors?

A. Yes, sir.

Q. Are those doors open at all times?

A. No, sir, they are not.

Q. What times would they not be open?

A. After 10 at night and on holidays we open, we unlock them about 12, and they stay open until about 7 in the evening. The other times they are normally open except Sundays and Sundays they are opened about 10 and they close again about 7 in the evening. These doors are locked at 10 and are reopened again at 7 a.m., the next morning.

Q. Can any member of the public enter at any time when it is locked?

A. No, sir, they cannot, not without a pass.

Q. And at the times when it is open someone can enter but they have to open the door physically go through it?

A. Yes, sir.

[62] Q. They are not wide open in the sense that the door of this room is now open so that someone can walk in without taking any physical action.

A. That's correct.

Judge Ricci: Another question about the sidewalk. Mr. Ballard, I assume, correct me if I am wrong, when you speak of sidewalk a little bit elevated perhaps, at least that is an area where the cars cannot go.

The Witness: That's correct.

Judge Ricci: So that while the cars scoot around to find a parking space, if a person who wants to get up into the store wants to walk around up on the sidewalk, he is on the sidewalk in the sense that at least the cars can't get at him.

The Witness: That's correct.

Judge Ricci: Yes, sir.

Mr. Cohen: Thank you. Does Scott Hudgens own and operate the entire shopping center as shown on Exhibit 2 to the stipulation, the large diagram?

The Witness: Yes, sir, with the exception of the Rich's building. Rich's owns their own building.

Q. (By Mr. Cohen): And the various numbered spaces of stores shown on exhibit 3, are those all leased by Scott Hudgens Company?

A. Yes, sir.

Q. Including number 19, the Butler's Shoe Store?

[63] A. Yes, sir.

Q. You also indicated that Butler's—excuse me, Scott Hudgens leases the kiosks. How many kiosks are there?

A. There are three now, sir.

Q. Are these leased to customers in the same way the stores are leased to customers?

A. Yes, sir.

Q. Is the rent any different per square foot for the kiosks than they are for the stores?

A. Yes, sir, it's much higher because the kiosks are sitting in the middle of the mall in the prime retail sales area. People look at these kiosks from all four sides, and people who have things to sell inside it enjoy higher sales than people inside the stores. Therefore, we charge higher rent.

Mr. Cohen: Would you please mark this as Exhibit 5?

(The document referred to was marked for identification as Respondent's Exhibit 5.)

Mr. Cohen: You have indicated that the stores and the kiosks, the people who lease these enter into—lease them from Scott Hudgens Company. Do they sign a common form lease?

The Witness: Yes, sir.

Q. (By Mr. Cohen): Showing you Exhibit 5, is that the lease in question?

A. Yes, sir, it is.

Judge Ricci: What do you mean in question? You said a [64] common form, is this for the kiosk only, or is the same one used for stores—is this the same lease used for the stores and the kiosks?

The Witness: Yes, sir.

Judge Ricci: Was it in use in 1971?

The Witness: Yes, sir, a form of that lease was. Yes, sir, this lease was in use in 1971, January 25, 1971.

Mr. Cohen: I would like to direct your attention to page 6, the last sentence of the first paragraph. Would you read that to yourself, please?

The Witness: Which number was this you said, sir?

Q. (By Mr. Cohen): Pardon me?

A. Which number did you say?

Q. The last paragraph—I'm sorry, the last sentence of the first paragraph appearing on the page, starting with "Lessee will not encumber or obstruct—".

Mr. Mascotti: What page is that?

Mr. Cohen: Page 6.

The Witness: What was your question, sir?

Mr. Cohen: Would you read that to yourself, have you read that?

The Witness: Yes, sir.

Q. (By Mr. Cohen): Could you tell me whether that policy was enforced in January 1971?

A. Yes, sir, it sure was.

[65] Q. Do you know of any exception to that policy that took place during that time?

A. No, sir, I do not.

Q. Would you also read one other paragraph, please, number 55 appearing on page 7, paragraph 55.

(Brief pause.)

Q. Was that policy in effect in 1971?

A. Yes, sir, it was.

Q. Was it enforced, to the best of your knowledge?

A. Yes, sir.

Q. Were there any exceptions made thereto as far as you know?

A. None that I know of.

Mr. Cohen: I would like to offer at this time Respondent's Exhibit 5.

Mr. Mascotti: Judge, I see no material relevancy to this and what are we driving at here. This is a lease between Butler Shoe Company and Scott Hudgens Company, what has that got to do with the Union?

Judge Ricci: I receive into evidence Respondent's Exhibit Number 5.

(The document referred to, heretofore marked Respondent's Exhibit 5, was received in evidence.)

* * * * *

[67] Mr. Cohen: No, I want the witness to say. How was the Mall constructed, can you tell us?

The Witness: The Mall was constructed with storefronts of glass. This glass is put there so that it will make it very easy and very comfortable for a person walking down these

aisleways to look inside a store and to select merchandise from the Mall actually.

Q. (By Mr. Cohen): Is the Mall carpeted in any way?

A. No, sir.

Q. You have indicated, I think one of the diagrams shows, particularly number 4, shows that there are planters, benches, fountains and pools, drinking fountains, contained in the Mall in the common aisleways. Who put those in?

A. Scott Hudgens put those in there, we put them in for the convenience of our customers.

Q. Is there music piped into the Mall building?

A. Yes, sir.

Q. Is the Mall building temperature controlled?

A. Yes, sir, it is air conditioned in the summer and heated in the winter.

Q. Are there restrooms off the aisleway?

A. Yes, sir.

Q. What is the purpose of the temperature control, the air conditioning?

A. The purpose of all the trouble we go to there to provide [68] these things in the Mall is to make sure that our customers have the greatest of ease with shopping, and make it just as convenient as we possibly can. We feel that the more convenient we make it, the conveniences we give them above other sections, above other shopping centers, and things like this, the more customers we'll have. They will enjoy shopping in our shopping center more than they would shopping in other places. Therefore, we put these things in in hopes it will be pleasing to the customer and it will be very rewarding to us based on more money they spend in our shopping center than they would in other places, thereby increasing our profits.

Q. Does the business that individual stores do affect in any way the rent that you receive?

A. Yes, sir, every store there is on a percentage of gross sales for rent calculation, they pay a minimum rent against a

percentage rent. If sales go over a certain point they pay a certain percentage of these sales. So we like to see as high a sales as possible in each store in that shopping center.

Mr. Cohen: May we be off the record a second?

Judge Ricci: Off the record.

(Discussion off the record.)

Judge Ricci: On the record.

Mr. Cohen: I am going to show you various exhibits that have been marked, I am showing you first what has been marked as Respondent's Exhibit Number 18, can you tell me what that is, [69] please?

(The documents above referred to were marked for identification as Respondent's Exs. 6 through 18, inclusive)

The Witness: That's a commercial kiosk.

Q. (By Mr. Cohen): That commercial kiosk has been leased to a tenant who sells photographs?

A. He paints portraits for a living, so we have leased it to him.

Q. And he signed one of the lease agreements we talked about?

A. Yes, sir, I think so.

Q. Were there kiosks of the same type in 1971?

A. Yes, sir, there was one of them.

Q. Now there are three?

A. There are three, right.

Q. Showing you number 17, can you tell me what that is?

A. That's the main entrance to the Woolworth store.

Q. Did it appear substantially in this same form in 1971?

A. Yes, sir.

Q. Showing you number 16, can you tell us what that is, please?

A. That's the main entrance into the Rich's store from the Mall.

Q. And number 15, is that a similar photograph?

A. Yes, sir.

Q. And number 14?

A. Yes, sir, it sure is.

[70] Q. Did the entrance to the Rich's store appear in substantially the same form in 1971?

A. Yes, sir.

Judge Ricci: Don't stop.

Mr. Cohen: Showing you number 13, would you tell us what that is, please?

The Witness: That's a picture of the Mall from the Rich's end going toward Butler Shoe Store and the Woolworth store.

Q. (By Mr. Cohen): Looking down the mall?

A. Looking down the Mall.

Q. And is that view substantially as it would have been in 1971?

A. Yes, sir, the building itself is. We have changed planters and this sort of thing.

Q. Substantially the same?

A. Substantially the same thing.

Q. Showing you number 12, will you tell us what that is, please?

A. That is a carousel that kids ride in the mall.

Q. Who put that up?

A. Scott Hudgens Company.

Q. That is located outside the Woolworth store?

A. Yes, sir.

Q. Showing you number 11, would you tell us what this is, [71] please?

A. That's the sign posted on all of the doors, or painted on all the windows to the entrances to the shopping center.

Q. Those are the four main entrances you have talked about?

A. That's right.

Q. This is the door you have talked about?

A. Yes, sir.

Q. And the lock shown there?

A. The lock and the handles.

Q. Is that the way the four doors appeared in 1971?

A. Yes, sir.

Q. Was that same sign on the door at that time?

A. Yes, sir, the same sign.

Q. Showing you number 10, will you tell us what that is, please?

A. This is the charity booth.

Q. I'll have you tell us what the charity booth is in a second. The charity booth is the smaller of the rectangles on Exhibit Number 4?

A. Yes, sir.

Q. Showing you Exhibit Number 9, would you tell us what that is, please?

A. This is a shot through the corner of the Chic-File-A store.

Q. Which is one of the tenant stores?

A. Yes, sir.

[72] Q. And on Exhibit number 3, that's the present 3, where would that be? Just tell us.

A. At the corner of the number 28 store.

Q. Fronting on this new aisleway that has just been constructed?

A. Yes, sir, it fronts on the old mall and the new mall.

Q. Showing you number 6, will you tell us what that is, please?

A. That's a picture of the main entrance of the Chateau Pastry Shop, store inside the shopping center. It is also a corner store and shows that you can walk through, walk from the mall through this store back to the mall, and if you did not look up you never would know you had left the mall.

Q. Do customers actually go through either Chic-Fil-A, as shown in Number 8, or the Chateau Pastry Shop and cut across those stores to get from one mall aisleway to the other?

A. Yes, sir, they sure do.

Q. Where is Chateau Pastry Shop shown on Exhibit 3, what is the number?

A. Number 43.

Q. And is that as it existed substantially in 1971?

A. Yes, sir.

Q. Showing you number 7, will you tell us what that is, please?

A. That is the main entrance to the Thompson-Boland-Lee Store.

Q. What number is that on Exhibit 3?

A. That's number 36.

[73] Q. 36. Is that how it substantially looked in 1971?

A. Yes, sir.

Q. Showing you Exhibit 8, tell us what that is, please.

A. That is the main entrance into the Regenstein Store, North DeKalb Mall.

Q. Is that how it looked in 1971?

A. Yes, sir.

Q. Where is that store located on Exhibit 3?

A. It's number 29.

Q. In Exhibit Number 7, and I think number 1, the picture of the Butler's Store already in evidence, are displays outside the store, the actual entrance to the store itself, is that a common or infrequent situation that a store will have that kind of display?

A. Yes, sir, it's common.

Q. Why do stores have those kinds of displays outside the store?

A. They promote sales items and put high impulse items out there so that when a customer is walking along they will see this and will immediately pick it up and go inside and buy it. This is a very good selling area right there.

Judge Ricci: I notice in that picture you are talking about, number 1, you are speaking about that display inside the building line, as it were, in the entrance to the Butler's Shoes, right?

[74] The Witness: Yes, sir.

Judge Ricci: They can't put anything out in the general quarters where people have to walk, can they?

The Witness: No, sir.

Judge Ricci: That would be contrary to the lease which says you cannot obstruct the walkways.

The Witness: That's right.

Mr. Cohen: I would like to offer at this time, Mr. Examiner, Exhibit 8—I'm sorry, 6 through 18.

Judge Ricci: 6 through 18?

Mr. Cohen: That is correct.

Judge Ricci: Okay.

Mr. Cohen: Which are the photographs.

Mr. Mascotti: Store in the Mall as of 1973, right?

Judge Ricci: And also pretty much what they were like in '71, whatever the witness said. I receive into evidence Respondent's Exhibits 6 through 18.

(The documents referred to, heretofore marked Respondent's 6 through 18, were received in evidence.)

Mr. Cohen: Is there a maintenance staff that maintains the mall building?

The Witness: Yes, there sure is. The Scott Hudgens Company hire and maintain people out at the shopping center just about all the time, we keep at least four maintenance men to keep the place clean and operating smoothly. We keep a security force [75] there in the afternoons and evenings to protect and patrol our property. All this is paid for by Scott Hudgens Company.

Q. (By Mr. Cohen): Do we have a man who is in charge of maintenance and security of the Mall building?

A. Yes, sir.

Q. What is his name?

A. Mr. L. E. Rogers.

Q. I take it that this shopping center pays taxes on the mall building.

A. Yes, sir, they sure do.

Q. Does it have insurance to cover the mall building?

A. Yes, sir.

Q. Will you tell us what the total cost approximately annually is to maintain the common area, not the tenant store areas but the common areas of the shopping center, North DeKalb Shopping Center, as far as taxes, insurance and other costs?

A. We break this down into two sections, as far as maintenance costs go, we have a mall maintenance charge which takes care of your inside common areas. This cost runs about $50,000 a year. Taking care of the parking lot which includes striping and lighting and policing costs approximately $45,000 a year. In addition to that, we pay $85,000 a year in taxes on the building and the parking lot.

Q. Those are the costs involved in the common area of the building?

[76] A. Yes, sir.

Q. Do the tenants share those costs in any way with Scott Hudgens?

A. Yes, sir, they sure do. We are reimbursed to a certain extent by what we call maintenance fees. These maintenance fees are pro rata in that they pay so much per square foot in relation to the total shopping center. They are limited on their expense to usually 25 or 35 cents a square foot. We have our maintenance crew perform these services and run up these bills and this sort of thing, and then at the end of each quarter we bill this maintenance cost back to the tenant. However, the tenant is limited in that they only pay like 25-cents a square foot maximum. These costs can go over and they do go over and when they go over they start getting into the landlord's pocketbook rather heavily.

Q. Then they would be absorbed by Scott Hudgens Company?

A. They would be absorbed by Scott Hudgens. Scott Hudgens absorbs approximately $25,000 of this cost in 1972.

Q. I'm going to ask you some questions about policy and I would like to direct your attention to 1971, January of that

year, the time this case arose. At that time did North DeKalb shopping center have any policy against handbilling, passing out literature on the shopping center?

A. Yes, sir, we did. We didn't allow anyone to pass out literature on the shopping center or the common areas of the [77] mall.

Q. Did you have any policy against people marching up and down with placards at that time?

A. Yes, sir, we sure did.

Q. What was that policy?

A. That policy was not to allow anyone to march up and down with placards or any other shape or form of advertising in the mall and the parking lot.

Q. Was this policy enforced uniformly?

A. Yes, sir, it sure was.

Q. It was not directed only against unions?

A. No, sir, we even went to the extent, especially during the political campaigns, we have a lot of politicians out there that want to politic on the mall, they try to walk up and down the mall handing out literature and this sort of thing. We ask them to leave. We have asked people such as Senator Gambrell, Commissioner Clark Harrison, Senator Nunn—

Mr. Mascotti: Wait a minute, Senator Nunn wasn't running in '71.

Judge Ricci: Well, there were some other very important persons in public life.

Mr. Cohen: He's testifying this is the policy, all these events occurred.

Judge Ricci: That's perfectly all right, don't worry about it.

[78] The Witness: We had another case where we actually had a person arrested for distributing leaflets.

Judge Ricci: Of course, the Government is not making it official that it was a discriminatory rule, right?

Mr. Mascotti: Right.

Judge Ricci: Keep asking whatever you went.

Mr. Cohen: Did these groups every try and come out to the center during this period?

The Witness: Yes, sir, peace groups, political, church, religious, every group you can imagine has tried to do something on that mall without permission, and we have asked them to leave.

Judge Ricci: What was the name of the case that involved the Viet Nam—

The Witness: Tanner and Lloyd.

Mr. Mascotti: Lloyd and Tanner.

Judge Ricci: Was there ever a Jehovah's Witness that came in there and tried to give a sermon, what was the name of that case?

Mr. Mascotti: Marsh.

Judge Ricci: Okay, let's go.

Mr. Cohen: Did you have representatives of a Baptist Church come out to the property?

The Witness: Yes, sir, we sure did.

Judge Ricci: Did you ask them to leave?

[79] The Witness: Yes.

Judge Ricci: You know, Mr. Cohen, I have been very nice and I have let you ask everything. In fact, I came determined to listen to anything anybody said. But don't go through all the religious denominations.

Mr. Cohen: I don't intend to.

How many requests do you receive from groups seeking to use the Mall each week or each month?

The Witness: About 15 to 25 a week, probably, approximately.

Q. (By Mr. Cohen): When these requests come in, is there any procedure for handling them?

A. Yes, sir. Either myself, Mr. Rogers or Jacqueline Reynolds who works for a promotional advertising company called David Bockle and Associates, receives a call. After we receive a call we ask them why they want to use this particular, what their purpose is for wanting to use the mall. So then they will go into a lengthy conversation, usually stating these things, and then we will explain our position and that we allow charitable organizations and civic groups to use our charity booth to sell homemade handmade items only. Or to, you know, to raise funds for different groups, and this sort of thing.

Q. Let's take this charity booth, if it is a civic group saying they want to sell, say cookies, candy and cake and so on, what arrangements are then made?

[80] A. All right. Provided that we have the booth at the time that they want it and it has not already been taken up by a prior commitment from another group, and that sort of thing, we will ask them to come down and to get a permit to use this booth. We fill it out for them, we give one to Mr. Rogers and we keep one ourself for the files, and we will give them one, and they have to have this permit with them and display it on this kiosk, on this charity booth to be able to stay there and sell their goods or raise their funds.

Mr. Cohen: Would you mark this, please, number 19?

The Witness: If these people don't have a permit we ask them to leave.

(The document above referred to was marked for identification as Respondent's Exhibit 19.)

Mr. Cohen: Showing you Respondent's Exhibit 19, is that the permit you just testified about?

The Witness: Yes, sir.

Q. (By Mr. Cohen): That would be initialed by someone from the Merchants Association?

A. Yes, sir, it sure would be.

Q. And whoever is using the charity booth?

A. That's correct.

Q. As I understand, it is your testimony that the charity booth would only be allowed to be used by a civic group selling a homemade item or an item that would not compete with anything [81] sold in the center.

A. That's correct.

Q. Would it be used for any other purpose?

A. No, sir.

Mr. Cohen: I would offer Number 19 at this point.

Judge Ricci: I take into evidence number 19.

(The document referred to, heretofore marked Respondent's Exhibit 19, was received in evidence.)

Mr. Cohen: Is there any restriction on the activities that may be engaged in in the charity booth?

The Witness: Yes, sir, they have to perform all their services and sales behind the kiosk. They cannot go soliciting up and down the mall, hawking, pulling people off the mall there and directing them toward this booth. They have to do everything behind the booth and people have to come to that booth to buy or to look at what they have. They cannot go out and solicit in the mall.

Q. (By Mr. Cohen): Is there a sign erected for that purpose?

A. Yes, sir, there sure is, there is one inside the charity booth.

Mr. Cohen: Can we go off the record?

Judge Ricci: Off the record.

(Discussion off the record.)

Judge Ricci: On the record. We have a stipulation of fact achieved amicably to avoid an exhibit that will be too [82] cumbersome and difficult to duplicate, it is stipulated that whenever the charity booth of which the witness has been talking is actually being used by the type of occupant that the witness described, then a written notice, very clear, and maybe 6 inches by a foot and a half, is placed in plain view of the people inside the booth as a constant reminder to them of the limitation upon their activity and that sign reads as follows:

"Confine activity to charity booth. No sales or solicitation outside of booth".

That's what it says on that constant notice. Do you agree Mr. Mascotti with this stipulation of fact proposed by Mr. Cohen?

Mr. Mascotti: Correct.

Judge Ricci: Have I stated it correctly?

Mr. Cohen: You have.

Judge Ricci: It is now a stipulation of acts on this record.

Mr. Cohen: Apart from the charity booth is there any other facility of the North DeKalb Shopping Center that can be used by civic groups?

The Witness: Yes, sir, there is an auditorium.

Q. (By Mr. Cohen): I am showing you Exhibit Number 3, where is that auditorium located?

A. It is behind Store Number 4.

Q. It does not have access to the mall itself?

[83] A. Yes, sir, it does have access to the mall.

Q. How do you get there from the mall?

A. Through a corridor.

Q. It does not have an entrance actually facing on the mall.

A. No, sir, it does not.

Judge Ricci: How do you get in—Oh, a corridor some way. Anyhow behind Store number 4 is an auditorium?

The Witness: That's right.

Judge Ricci: Good.

Mr. Cohen: To what groups is that auditorium, what groups have access to that auditorium?

The Witness: Any group that you might want, commercial, civil, anything like that, religious group could use that auditorium. They have to make prior arrangements through the same people I discussed just a while ago for it. If it is a group of people that are trying to get people to buy stock or trying to explain why they should buy land or something like this, what we call a commercial venture, then we are compensated for the use of this auditorium.

Q. (By Mr. Cohen): You charge rent for the use of the auditorium?

A. Yes, sir. If it is only for a garden club meeting or just a group of people there in the community, or something like that that want to go in and have a meeting there, then we will let them use it free of charge.

Q. Do the people who use the auditorium have to sign an [84] agreement of any kind?

A. Yes, sir,they sure do.

Mr. Cohen: Would you mark this, please, Exhibit 20?

(The document above referred to was marked for identification as Respondent's Exhibit 20.)

Mr. Cohen: Showing you Exhibit 20, is this the agreement you just testified on?

The Witness: Yes, sir, it is.

Q. (By Mr. Cohen): Was this in use in 1971?

A. Yes, sir.

Q. This has a number of conditions listed, rules I should say.

A. Yes, sir.

Q. If someone using the auditorium were violating any of these rules, what would occur?

A. We would advise them immediately and tell them to be in compliance with the rules. If they did not—

Judge Ricci: Throw them out? I mean, not by calling the Police or threatening arrest, I understand, but you would request that they either leave or comply with the rules.

The Witness: I did not say that.

Mr. Cohen: Tell us what you would do then.

The Witness: Okay: I would tell them, you know, to get with it and get with the rules there, and try to obey them. If they did not, we would ask them to leave. Then if they [85] did not leave, we would have them arrested and taken away.

Mr. Cohen: I would offer Exhibit 20.

Judge Ricci: I didn't hear any objection. I receive number 20 into evidence.

(The document referred to, heretofore marked Respondent's Exhibit 20, was received in evidence.)

Mr. Cohen: Mr. Billard, would anyone be permitted to engage in any non-commercial activity not authorized or—Would any group be allowed, charitable group, religious group, political group, at any time be allowed to engage in any activities on the shopping center premises except in the kiosk or in the auditorium?

The Witness: No one with one exception. We have made one for the Salvation Army and the Salvation Army only, and that is that we allow them to go outside using the sidewalk adjoining the main entrances to the shopping center, the four main entrances to the shopping center—

Q. (By Mr. Cohen): To the shopping center or to the mall?

A. To the mall, excuse me. To the mall, and they can stand there but they cannot solicit by hawking, by grabbing people and this sort of thing and pulling them over. All they can do is stand over with their kettles. And if somebody has to walk over and put money in there, then that's fine. We have made one exception with them. One day Mr. Rogers let one of them take his clacker out, required that he take his clacker [86] out of his bell, it was very cold, very wet and raining and snowing and that sort of thing, and he allowed the man to stand just inside the mall without a clacker in his thing, and without soliciting whatsoever. All he was doing was being human about the thing and letting him be out of the weather.

Q. Apart from that one occasion, has any other group been allowed inside the mall?

A. No, sir.

Q. And apart from the Salvation Army outside the mall has any other group been allowed there?

A. No, sir.

Q. That happens, I take it, only once a year.

A. That's correct, during Christmas season.

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Mr. Cohen: Mr. Ballard, you have testified about this policy of not permitting anyone with this one exception for [87] the Salvation Army, to use center premises unless they are in the kiosk or in the auditorium. Would you tell us what the reason is for that policy?

The Witness: Yes, sir. Everything we do at North DeKalb Mall, we try to make it as convenient, as comfortable, as pleasing as we possibly can for our customers. The reason we do this is because it is our center, we do it also, we go to great lengths to make sure people come to North DeKalb and shop rather than go to another competing center.

Judge Ricci: He told you he wanted them to be comfortable, be in a spending mood, nice, they pipe in good music and all to make them nice and generous. Why is he telling us again?

Mr. Cohen: What would there be about people engaged in these activities in the mall that would detract from that purpose?

Judge Ricci: Oh, why picketing would destroy business? You're right, ask him.

Mr. Cohen: Not picketing, why do you have that policy against handbilling and solicitation and these other activities, what is the reason for that particular policy?

The Witness: We feel that would just distract the customers and keep her away from a particular place. She doesn't want to go back because she gets one of these handbills. They take these handbills, they throw them down causing us more maintenance costs. If there is some handbill there [88] that somebody thinks is, you know, there could be a feedback, it may start a ruckus, increasing our security cost and this sort of thing. All we want is a nice, clean, comfortable mall for our customers to walk down and view unobstructed any storefront, any piece of merchandise, anything they may want to buy.

That is our primary purpose for having that shopping center, along with making a profit. And this is the only reason we have the shopping center, and these are the reasons that we enforce the rules as stringently as we do.

Q. (By Mr. Cohen): Why do you have the kiosks and the auditorium there?

A. We have that there to accommodate people in the surrounding community. We realize that sometimes they don't have places to go and hold a large meeting or something like that. So we do this, making it even more convenient for people to come to north DeKalb Mall. It's the draw. You know, they bring themselves, their frends and all, and by chance while one of them is walking around out there, he may buy something. Every dollar counts and every dollar puts money in our pocket, and that is what we are interested in.

Q. Would you permit a group from outside the Atlanta area to use the kiosks or the auditorium?

A. No, sir.

Q. You indicated that you have enforced this policy of yours. Have you ever arrested anyone for violating this policy? [89] A. Yes, sir, we sure have. We have a case now that is being decided on a Miss Becker. She came out along with two or three of her friends and she was going to pass out anti-war literature—

Judge Ricci: I'm going to have to stop it.

Mr. Cohen: I would like you to take judicial notice of the case involving this very same center.

Judge Ricci: He says he had somebody arrested, I believe it.

Mr. Cohen: It is a case in the United States Supreme Court involving this shopping center. I just want to refer you to it.

Judge Ricci: The United States Supreme Court?

Mr. Cohen: The United States Supreme Court.

Judge Ricci: Put it down.

Mr. Cohen: I just want to put the citation in the record, sir.

Judge Ricci: Off the record.

(Discussion off the record.)

Judge Ricci: On the record.

Mr. Cohen: I would like for you to take judicial notice of the case of Richard Guy Steffel (spelling) S-t-e-f-f-e-l, v. John R. Thompson, opinion by First United States District Court for the Northern District of Georgia, which is reported in 334 Fed. Sup. 1386, 1971.

[90] Judge Ricci: 1386.

Mr. Cohen: Decision of United States Court of Appeals reported at 459 Fed. 2nd 919.

Judge Ricci: 919.

Mr. Cohen: 919, 1972. There was also a decision and rehearing by the Court in Bond [sic], I don't have the citation.

Judge Ricci: The same Circuit?

Mr. Cohen: Same Circuit and it is now pending before the United States Supreme Court on a petition for cert. that has not been acted upon yet, number 725581 which involves—the reason I ask you to take judicial notice of it, it involves one of the defendants in the case of Scott Hudgens and the incident involves is someone who was arrested for coming on to the North DeKalb Shopping Center to engage in protest against the Viet Nam War and against the sale of lettuce at one of the stores in the center.

Judge Ricci: Okay.

Mr. Cohen: The facts contained therein are filed. I also ask, at the same time, maybe I can place it into evidence, of another pending case involving the North DeKalb Shopping Center. It was recently filed, entitled Scott Hudgens v. Local 315, Retail, Wholesale and Department Store—

Judge Ricci: Local 315?

Mr. Cohen: 315, the Charging Party in this case. The Atlanta Mobilization Committee and Richard Guy Steffel, [91] Number B-81424, in the Superior Court for the County of

Fulton Georgia, which asks for a declaratory Judgment to prohibit the union involved in this case, as well as others, from coming onto the shopping center. The declaratory judgment that such conduct would be a violation of the Georgia Trespass Law, Title 26 Georgia Code Annotated, Section 26-1503. I have the case, I can put it in evidence.

Judge Ricci: Has there been a decision? You want to make it an exhibit?

Mr. Cohen: Yes.

Judge Ricci: Number 21 of the Respondent.

(The document referred to was marked for identification as Respondent's Exhibit 21.)

Mr. Cohen: I only have one copy.

Judge Ricci: Okay to take it, it's argument?

Mr. Mascotti: Yes.

Judge Ricci: I receive into evidence the Complaint, Respondent's Exhibit Number 21.

(The document referred to, heretofore marked Respondent's Exhibit 21, was received in evidence.)

* * * * *

[93] Q. (By Mr. Cohen): I'll ask you to look at, Mr. Ballard, the statement you gave to Mr. Mascotti which was Exhibit 4 to the stipulation of fact. That indicates that you had on January 22nd, 1971 two conversations with pickets. The first of which there has been some testimony already today personally you had with several of the pickets at the center. You indicate in here that you also talked to pickets on the telephone.

A. Yes, sir.

Q. I would like to ask you about that conversation. Approximately how long after you talked to the pickets in person did that conversation on the telephone occur.

A. About an hour or two hours.

Q. Did you call the picket or did the picket call you?

A. He called me.

Q. Did you know the name of the picket?

A. No, I do not.

Q. A man. There is also a statement which is Exhibit 3 from a picket by the name of Roger Long. Do you remember whether [94] that was the person you talked to or not?

A. No, I do not.

Q. It could have been that person?

A. That is correct.

Q. Now, when the person called you on the telephone did he identify himself in any way?

A. Yes, he identified himself. I'm not sure about whether he called his own name and this sort of thing or not, but he identified himself by saying that he wanted to picket on the mall. When he said this I told him, you know, that we didn't allow people to picket on the mall, and he said well, he was going to do it anyway. And I said, "We don't allow people to picket on the mall. They have to be outside on the sidewalk or either out at North Druid Hills or Lawrenceville Highway on the right of way, one or the other". You know, "You just don't picket on my mall".

Q. When you said sidewalk did you identify that sidewalk in any way?

A. I said the outside sidewalk joining the building, you know, the building sidewalk or the sidewalk at the mall, the mall sidewalk.

Q. So you made it clear that it was the sidewalk that surrounds the mall building?

A. Yes, sir, I would have thought it would have been clear, yes, sir.

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[95] Mr. Cohen: So if we are on the record, you had a conversation with a man who indicated that he was going to picket at North DeKalb Center Mall. Will you tell me what you replied when he asked to picket on the center mall?

The Witness: I told him he could not picket on the mall itself, he would have to be outside on the sidewalk of the building, or either on North Druid Hills Road or Lawrenceville Highway, on public property thereon the right of way.

Q. (By Mr. Cohen): What did he respond at that point, if anything?

A. I don't remember.

[96] Q. Did he respond in any way?

A. In that he said that he was going to picket anyway, is that what you asked me?

Q. Is that what he said? If that is what he said.

A. I think that is what he said, I'm not sure, you know, I'd rather not—

Q. Did you say anything else that you recall?

A. Not that I recall.

Q. Is there anything else to the conversation that you recall?

A. No, sir.

Mr. Cohen: May we go off the record a second?

Judge Ricci: Off the record.

(Discussion off the record.)

Judge Ricci: On the record.

There has been marked Respondent's Exhibit Number 22, a map of the county in which this shopping center is located, and there is marked on the map in blue ink, in the very center, a square with "NDC", that's the shopping center we have been talking about. There has also been marked on the map a little lower down, one to the right and one to the left lower down, two other squares with the letters "Public Bldg." on each of them. The purpose of the exhibit by the Respondent is to show that this is away from the shopping center, where they are and were at the time, I guess, certain public buildings. Now, [97] to start with, do you agree this is a reliable statement?

Mr. Mascotti: Yes, I do.

(The document above referred to was marked for identification as Respondent's Exhibit 22.)

Judge Ricci: Mr. Cohen?

Mr. Cohen: Yes.

Judge Ricci: The company offers it?

Mr. Cohen: I may have some questions on it.

Judge Ricci: Of course, but up to this moment, the two squares being buildings, public buildings, and the little square means the shopping center.

Mr. Cohen: That's correct.

Judge Ricci: I receive into evidence Respondent's Exhibit Number 22. Now when he talks we will know what he is taking about.

(The document referred to, heretofore marked Respondent's Exhibit 22, was received in evidence.)

Mr. Cohen: Showing you Respondent's Exhibit 22, I'm taking first of all the public buildings that are shown, I-285, will you tell us what that public building is?

The Witness: Yes, sir; that public building has the DeKalb Police Station, DeKalb maintenance people and DeKalb office building. It also has the DeKalb County incinerator, and this sort of thing.

Judge Ricci: An incinerator? Mr. Cohen, how did the [98] incinerator get into this case?

Mr. Cohen: I didn't know there was an incinerator there.

Judge Ricci: Go ahead, ask him some more.

The Witness: Okay, let me go on to state that there is a very modern four story building that is brand new right there adjoining this incinerator, and it is indeed an office park.

Mr. Cohen: It's used by?

The Witness: DeKalb County.

Q. (By Mr. Cohen): County employees of De Kalb County?

A. Yes, sir.

Q. What is the other public building that you have got marked, which is the one over on Church Street?

A. This is DeKalb County Courthouse, they carry on the various trials and this sort of thing in this Courthouse, and they

also have county offices there that are not housed in these other public buildings.

* * * * *

[99] Mr. Cohen: Have any people utilized either of those facilities to engage in protests or to communicate a message to the public?

The Witness: Yes, sir.

Mr. Mascotti: I—He asked the question—

Judge Ricci: You repeated the same question you said before, you got angry with me when I stopped it. Now you have deprived General Counsel of an opportunity to object.

Mr. Cohen: He can use the motion to strike if he wishes to.

Mr. Mascotti: It has no bearing on the case.

Judge Ricci: Nothing is hurt by more answers.

Mr. Cohen: Will you describe, if you will, what type of activities you have personally seen being conducted in those locations by people communicating to the public?

Mr. Mascotti: I object, your Honor, it's immaterial.

Judge Ricci: Sustained. Sustained.

Mr. Cohen: May I—

[100] Judge Ricci: Offer of proof?

Mr. Cohen: I want to first argue, if I may, why I think it is relevant.

Judge Ricci: Yes.

Mr. Cohen: I think it is relevant to show in this case, Mr. Ricci, the ways that people can communicate a message to the public because there were other ways that were available to the union in this case. Our position in this case which we argued to the Board is that the union had reasonable means of access to the public other than picketing on the North DeKalb Center Mall. In order to demonstrate that point, I want to indicate how other groups have sought to communicate messages. The fact that someone wants to voice an opinion against the Viet Nam War or any other purpose may have utilized public facilities located in that area of the North DeKalb

Shopping Center. To me it is very critical showing that there are ways for the union here to have publicized this message besides using private property of Scott Hudgens Company. That is the purpose of my question, or to demonstrate that that is the line of questioning I am pursuing.

Judge Ricci: I sustain the objection.

Mr. Cohen: May I make an offer of proof?

Judge Ricci: Sure.

Mr. Cohen: May I do it by question and answer?

Judge Ricci: No.

[101] Mr. Cohen: I would offer to prove that if the witness were allowed to testify he would indicate that the locations he has testified about on Respondent's Exhibit 22, there have been people protesting the Viet Nam War, protesting other Government practices who have engaged in picketing and handbilling on those locations.

Judge Ricci: I reject the offer of proof.

Mr. Cohen: Mr. Ballard, do large number of people gather at the two locations shown, two public building sites shown on Exhibit 22?

Mr. Mascotti: I object.

Judge Ricci: I'll tell you what, it's going to be faster, even if it's wrong. Everybody knows how people protest.

Mr. Mascotti: I know, but what has it got to do with this case?

Judge Ricci: Therefore, nothing is hurt by repeating it.

Mr. Mascotti: If you have got to get on a plane at 6 o'clock, we'd better get down to the meat of the case.

Mr. Cohen: It is not going to take me long.

Judge Ricci: The urgent thing is to hear the case. Mr. Cohen, I don't want him to feel prejudiced, ask him. I don't remember the question, ask it again.

Mr. Cohen: My question was, do large groups of people gather at the two public locations shown that you have marked on Exhibit 22?

[102] The Witness: Yes, sir.

Q. (By Mr. Cohen): Would those groups of people be larger than the groups of people who may frequent the North DeKalb Center Mall in January?

A. On certain days, sure.

Q. Are there other public sites besides the two you have mentioned that you have not marked on Exhibit 22? You marked two, are there others as well?

A. Yes, sir.

Q. Can you tell us briefly what those are?

A. There is a United States Post Office, the DeKalb County School grounds, the DeKalb County Junior Colleges, the public right of ways—

Judge Ricci: What do you mean public right of ways?

The Witness: The right of way owned by the State of Georgia or either by the Federal Government.

Judge Ricci: You mean a highway?

The Witness: Yes, sir.

Mr. Cohen: I'm talking about buildings in the area, I'm sorry.

The Witness: Okay.

Q. (By Mr. Cohen): The ones you just mentioned, are those all located in the area shown by Exhibit 22?

A. Yes, sir.

Q. Do large groups of people frequent these other places you [103] have mentioned?

A. Yes, sir; I'm sure they do.

Q. Again confining yourself to the area shown on Exhibit 22, are there places where sporting events are held in that area where large groups of people come?

A. Yes, sir; there is Avondale Stadium, Southwest DeKalb Stadium, there is Atlanta Stadium, there is the Omni, there is .....illegible..... Colosium.

Q. Would all those be in the area shown on Exhibit 22?

A. Yes, sir.

Q. Do large groups of people frequent each of those places?

A. Yes, sir, they sure do, very large.

Q. Would those groups exceed the number of people found at the North DeKalb Center Mall in January on a given January day?

A. Yes, sir, they sure will.

Q. Again confining yourself to Exhibit 22, are there factories and military bases which employ large numbers of people?

A. Yes, sir, there sure are.

Q. Could you tell us what those are briefly?

A. Chevrolet has two plants, one on the north side perimeter, there is another plant on Boulevard, on the southeast side of Atlanta there is Ford Motor Company that has a large manufacturing plant, there is Lockheed, there is Crown Cork and Seal, and any number of places, there is the State Farmers [104] Market, very large places that people would congregate.

Q. Will the number of people found at each of those sites on occasion be greater than the number found at the North DeKalb Shopping Mall on a January day?

A. Yes, sir.

Judge Ricci: The Atlanta Braves, is that the name of the team?

The Witness: Yes, sir.

Judge Ricci: Are they within that map?

The Witness: Yes, sir.

Judge Ricci: A lot of people go to see baseball games.

Mr. Cohen: I now offer Exhibit 22.

Judge Ricci: I have received that already, and if I didn't, I receive into evidence Respondent's Exhibit 22.

Mr. Cohen: Mr. Ballard, did Local 315 of the RWDSU, the union in this case, did it ever request permission to use the kiosk at the North DeKalb Center Mall?

The Witness: No, sir, they did not.

Q. (By Mr. Cohen): Did they ever ask permission to use the auditorium?

A. No, sir, they did not.

Q. Just two more questions to ask you. You have talked about the entrances to the mall, I mean to the shopping center, and have indicated there is public property at each of those sites. Could a picket, someone with a picket sign, someone [105] handing out literature, stand at each of those five entrances without any danger to his life or his limb?

A. Yes, sir, he sure could.

Q. And could somebody coming by in a car at each of those entrances see the picket sign that he had in his hand?

A. Sure, very well.

Mr. Cohen: I have no further questions?

Mr. Mascotti: Just a few questions.

Cross-Examination

Q. (By Mr. Mascotti): Mr. Ballard, how large of a highway is this Lawrenceville Highway, is it six lanes, eight lanes, ten lanes?

Judge Ricci: Which highway?

Mr. Mascotti: Lawrenceville Highway.

The Witness: Which way?

Judge Ricci: All together, both ways, we are talking about the area that comes by the shopping center.

Mr. Mascotti: Right.

The Witness: Four lanes.

Q. (By Mr. Mascotti): Four lanes on one side and four on the other, isn't it?

A. No, sir, two lanes on one side and two lanes on the other side, to the best of my knowledge, it's two lanes on each side.

Q. And North Druid Hills Road is the other one, isn't it?

A. That's right.

[106] Q. How many lanes is that?

Mr. Cohen: I object, North Druid Hills does not border the shopping center.

Judge Ricci: Just a moment, the map shows there are four streets that come from Druid Hills Road and there are three entrances to the parking lot, right.

Mr. Cohen: But not off North Druid Hills Road.

Judge Ricci: Off the record.

(Discussion off the record.)

Judge Ricci: On the record.

In order that the last question be understandable to anybody who reads the transcript, if I misquote you, Mr. Mascotti, correct me, but I understand you to be asking the witness that road called Druid Hills Road, you know, Mr. Ballard, the one from which three streets connect, Birch, Oak Tree and Mistletoe, into the parking lot, that road; at that point where these three streets cut off, how wide is it, how many lanes in it?

The Witness: It's four lanes, sir.

Judge Ricci: Two one way and two the other?

The Witness: That's correct.

Judge Ricci: What else do you want to ask him?

Mr. Mascotti: Most of the people, or the majority of the people, I wouldn't say all because there might be an exception, use cars to come into your parking lot.

[107] The Witness: Either cars or buses, yes, sir.

Q. (By Mr. Mascotti): They don't walk, I mean.

A. The people that live close walk.

Q. Probably so, but I mean the majority of them. And you say you have 2,600 parking spots in there?

A. Yes, sir.

Q. Are they usually filled up every day?

A. No, sir.

Q. On an average, how many would you say you fill up during the day? Back in '71 now I'm talking about.

A. On an average how many, I don't have any idea.

Q. You have no idea. How many customers do you average or figure that come into the mall per day?

A. Based on an annual average, weekly average, there are 45,000 people.

Judge Ricci: Are you saying to the extent that you can judge if there are any records, about 45,000 persons visit the mall each week?

The Witness: On an average, right, this is on an annual average.

Judge Ricci: Of course, at Christmastime it would be a lot more crowded.

Mr. Mascotti: That's what I want to get at.

Now, on direct examination you testified that the union did not ask you to use the kiosk or the auditorium.

[108] Mr. Cohen: Kiosk.

Judge Ricci: Is that right?

The Witness: Yes.

Mr. Mascotti: Did you tell the union they could picket at the kiosk or the auditorium?

The Witness: No, sir.

Q. (By Mr. Mascotti): Do you have any idea of how much traffic is on Lawrenceville Highway? It's a pretty busy street, is it not?

A. Yes, sir, it's a busy street.

Q. Any North Druid Hills Road is quite a busy city street.

A. Yes, sir.

Q. Now, North DeKalb Shopping Center draws its people from Atlanta and Decatur and surrounding areas, right?

A. Yes, sir.

Q. How many people would you say normally are in the Atlanta area, the shopping area you deal with, a million and a half, two million?

A. I'm not qualified to answer that, I don't think.

Q. What is the size of Atlanta, do you know, roughly?

A. Yes, sir, it's roughly a million and a half people.

Q. And Decatur?

Judge Ricci: Is the shopping center within the city limits?

The Witness: Not of Atlanta.

[109] Mr. Mascotti: It's on the borderline.

Judge Ricci: That's all right.

Mr. Mascotti: Are you figuring DeKalb County too, in that million and a half?

The Witness: Yes, sir.

Mr. Mascotti: No further questions.

Judge Ricci: All right.

Mr. Cohen: I have a few questions.

Judge Ricci: What do you want?

Mr. Cohen: I want to ask him some questions.

Redirect Examination

Q. (By Mr. Cohen): Showing you Exhibit 2—I'm sorry, how big a street is Birch Street?

A. It's a two lane street, one lane going each way.

Q. And Oak Tree the same?

A. Yes, sir.

Q. And Mistletoe the same?

A. Yes, sir.

Q. Are those busy streets?

A. No, sir.

Q. Somebody would only be traveling down that street if they wanted to get from the North Druid Hills Road to the shopping center?

A. Yes, sir, or either they live on that street.

Q. There are homes on that street too?

[110] A. Yes, sir.

Judge Ricci: Would you say that these three streets, Birch, Oak Tree and Mistletoe—by the way, how many blocks is it on Oak Tree from the parking lot to Druid Hills Road?

The Witness: One.

Judge Ricci: One. That block and the one at Birch and Mistletoe, are those streets that have private houses on them?

The Witness: Yes, sir.

Judge Ricci: One family or two family houses?

The Witness: One family.

Judge Ricci: They are not commercial houses then?

The Witness: No, sir. Well,—

Judge Ricci: I mean on Birch, on Oak Tree and on Mistletoe itself.

The Witness: There is commercial and residential.

Judge Ricci: I see.

The Witness: Both.

Judge Ricci: I see, even on those streets.

The Witness: Yes.

Mr. Cohen: When you say it is a block, is that a normal city block or a longer block, the normal city block of a downtown Atlanta block?

The Witness: It's about the same size.

Q. (By Mr. Cohen): You testified Lawrenceville Highway is a busy street. Is there a stop sign, a stop light at any [111] point near the three entrances to the shopping center?

A. There is a stop light at the intersection of North Druid Hills and Lawrenceville Highway, which is right—

Judge Ricci: Wait a minute, do you mind answering the lawyer's question? He gets offended if you don't answer. You said that from Lawrenceville Highway—

Mr. Cohen: Mr. Ricci, I think the witness was answering the question.

Judge Ricci: I don't think he was, he's volunteering, I would rather he would answer the question.

You said this morning Lawrenceville Highway, from Lawrenceville Highway there are two entrances to the parking lot, the two to the right of this sketch.

The Witness: That's right.

Judge Ricci: The lawyers asked first at those entrances, and I am asking you, are there red lights?

The Witness: No, sir, not at those entrances.

Judge Ricci: You were saying further away from there there is a red light?

The Witness: Yes, sir.

Judge Ricci: Tell us where it is.

The Witness: Approximately 175 feet, at the intersection of North Druid Hills and Lawrenceville Highway. Approximately 175 feet from the top entrance.

Mr. Cohen: That's the northerly entrance on Lawrenceville [112] Highway.

The Witness: There is a stop light at the intersection of North Druid Hills and Lawrenceville Highway.

Q. (By Mr. Cohen): So that cars would only have to travel 175 feet then from that light, from that place where they stop for the light, to enter into the shopping center.

A. Yes, sir.

Q. And you testified earlier, I think, that cars in order to enter off that highway will slow down when they enter into the center.

A. Yes, sir. They have to stop coming out.

Q. Is there an entranceway—Is the entrance different at any point between the two entrances on Lawrenceville Highway and the entrances as you come off Mistletoe, Oak Tree and Birch, is the width or the size of the entrance in any way different?

A. Not to a great degree, they are about the same.

Q. One other question. You testified there are about 45,000 people who come to the center on an average. Are there a number of people who frequent this center in late January, is it greater or lesser than the average?

A. It's way less that the average. Very few people come in January.

Q. Is January then—How would you rank January, that period of time, as far as the number of people coming to the [113] center with other times of the year?

A. It would either be the very bottom or next to the bottom, January and February are poor retailing months, either one of them. There is almost nil traffic there.

Mr. Cohen: I have no further questions.

Mr. Mascotti: No further questions.

Judge Ricci: Okay.

(Witness excused.)

Mr. Cohen: May we go off the record?

Judge Ricci: Off the record.

(Discussion off the record.)

Judge Ricci: On the record.

There has been marked for identification a Respondent's Exhibit Number 23, it is an affidavit by a gentleman named (spelling) H-e-a-l-d, and the reason for the stipulation with respect to this exhibit is to avoid calling Mr. Heald. This is a statement of fact in the form of an affidavit. I understand that Mr. Mascotti for the General Counsel and Mr. Cohen for the Respondent stipulate that what is written on this affidavit is a fact, true, right?

Mr. Mascotti: Right.

Judge Ricci: Mr. Cohen?

Mr. Cohen: That is correct.

Judge Ricci: And I, therefore, receive into evidence the Respondent's Exhibit Number 23. We will leave it to Mr. [114] Cohen to give the girl copies because this is the original affidavit and you may want that back.

(The document referred to was marked Respondent's Exhibit 23 and received in evidence.)

Judge Ricci: I understand there is a further stipulation between the parties reached in conjunction with Exhibit 23. It is that there is no contention by the Respondent arising from this number 23 exhibit that the company that sells the shoes and the company that runs the warehouse are separate employers, that they are anything but single employer, whatever their corporate entity name might be. Correct, sir?

Mr. Cohen: That is correct.

Mr. Mascotti: All right.

Judge Ricci: That is a fact.

Mr. Cohen: Separate employers within the meaning of 8(b)(4) of the Act.

Judge Ricci: They are not separate employers.

Mr. Cohen: Not separate employers.

Judge Ricci: The further stipulation of fact for clarification is that the two groups of employees in the store or other Butler's Shoe stores do not constitute the same bargaining unit. You put it your way, sir.

Mr. Cohen: The employees, just like you defined it, the employees working at the North DeKalb Shopping Center in the Butler retail shoe store there and the employees working at [115] the Butler Shoe Corporation warehouse at 204 Brookwood Drive in Atlanta would not be part of the same bargaining unit under the Act.

Judge Ricci: Is that right, sir?

Mr. Mascotti: Fine.

Judge Ricci: That's the stipulation of fact.

Off the record.

(Discussion off the record.)

Judge Ricci: On the record.

Whereupon, LESLEY E. ROGERS was called as a witness, by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

Judge Ricci: What is your name?

The Witness: Lesley E. Rogers.

Judge Ricci: Where do you live, Mr. Rogers?

The Witness: 590 Martina Drive, Northeast, Atlanta.

Direct Examination

Q. (By Mr. Cohen): Mr. Rogers, by whom are you employed?

A. Scott Hudgens Company.

Q. What is your position there?

A. I'm maintenance and security supervisor.

Mr. Cohen: May I take a minute recess?

Judge Ricci: Sure, off the record.

[116] (Discussion off the record.)

Judge Ricci: On the record.

Mr. Cohen: Mr. Rogers, did you have that same position in January 1971?

The Witness: No, I did not.

Q. (By Mr. Cohen): What was your position then? Were you in charge of maintenance and security at North DeKalb Center Mall in January of '71?

A. No, I was not.

Q. What was your job then?

A. I was working at Broadview Plaza Shopping Center.

Q. But you presently are in charge of maintenance and security?

A. That's correct.

Q. How long have you held that job?

A. Approximately 20 months.

Q. Did you report to Mr. Ballard during the time that he was the general manager?

A. Yes, I did.

Q. To your knowledge, is the policy of security and the policy toward people coming out to the center, is that any different now than what it was in January of '71?

Mr. Mascotti: I object, Your Honor.

Judge Ricci: Overruled.

Mr. Mascotti: He wasn't there in '71. He doesn't know [117] what the policy was.

Judge Ricci: He can ask him about June of '71.

Mr. Cohen: He has been there 20 months.

Judge Ricci: He said he came in about June of '71. Is that right?

The Witness: Yes.

Mr. Cohen: Was the policy any different in June when you got there and January of '71, was there a change in policy?

Judge Ricci: How would he know, he worked somewhere else?

Mr. Masotti: I object.

Judge Ricci: Did he say he worked somewhere else?

Mr. Cohen: He worked somewhere else, but he would have known.

Did you change any existing policy?

The Witness: I continued the existing policy.

Q. (By Mr. Cohen): What security force is there at the North DeKalb Center Mall?

A. We have some of our own employees employed at certain shifts and we have an outside security agency to provide uniformed armed guards with two-radio communications. And then on the midnight shift we have our own personnel that cover, and on the weekends.

Q. What time are these guards present at the center?

A. Guards come on from Monday from 2:30 until 10:30.

Judge Ricci: The outside guards?

[118] The Witness: Yes, sir, the uniformed personnel. And on Saturday they come in at 10 until 11.

Mr. Cohen: 10 in the morning until 11 at night?

The Witness: Yes, sir, and then the midnight shift is covered by our employees, and the weekend is covered by our own employees.

Q. (By Mr. Cohen): Do the outside people and the people who work for Scott Hudgens, do they each get their directions and orders from you?

A. Entirely.

Q. Now just so the record is clear, what time is the mall locked and no access permitted?

A. The mall is locked at 10 o'clock weekdays and it is locked at 7 o'clock on Sundays, 7 p.m. on Sunday. It stays locked on weekdays until 7 o'clock in the morning, and on

Sunday until about—well, around noon. And then locked again about 7, 7:30 on Sunday night, Sunday evening.

Q. When the mall is locked can anyone enter without permission from you or Mr. Ballard?

A. No, sir, they have to produce a pass.

Q. During the time the mall is open, is there any dress regulation as to what people can wear or not wear during the times they come onto the mall?

A. We don't allow people that are barefooted and without shirts.

[119] Q. Do you enforce that policy?

A. Yes, we do.

Q. Do you have any regulation about people taking pets into the mall?

A. Yes, we do.

Q. What is that regulation?

A. If they have pets they have to carry them in their arms or have them on a leash, which means moving, we don't allow them to sit and lounge around in the mall.

Q. Do you enforce that policy?

A. Yes, sir, we do.

Q. Do you have any policy about cars remaining in the parking area?

A. Yes, we do. If a car stays overnight we have a check made on them to see if the car is abandoned or stolen. Mostly we see if it is stolen and we try to locate the owner, and then we try to call the owner and tell them to come get their car. And if we can't locate the owner we wait two or three days and then we tow it off.

Q. You call the owner, in that case what do you explain as far as the policy of the center?

A. We tell them that the parking lot is for our shoppers, for people to come in and out of the shopping center for the purpose of shopping, it is not a storage yard or not a used car lot.

[120] Q. Do you have people—Have any occasions arisen where people have left cars on the parking lot with signs indicating they are for sale or advertising something?

A. Yes, sir. Many times people have a car they want to sell, they park it on the parking lot with a for sale on it. We take the information from that sign and we call and notify them to come and remove the car pronto. You know, get it off right now.

Q. Do you give them any reason for that?

A. Yes, we are not a used car lot.

Q. This is what you tell them?

A. That's what I tell them.

Q. Are there any regulations that we posted in the parking area of the shopping center, driving regulations of any kind?

A. Yes, sir, speed limit signs 15 miles an hour speed limit and stop signs.

Q. Maybe we can indicate, is this the type sign you have reference to?

A. Yes, sir; no parking.

Mr. Cohen: Can we have the witness describe that for the record? Again it is—

Judge Ricci: Mr. Witness, about how many of those signs are up in this enormous parking lot that has 2,600 places?

The Witness: Very few, I don't know the exact number.

Judge Ricci: Three, four, ten?

[121] The Witness: Maybe half a dozen.

Judge Ricci: Half a dozen, there are half a dozen signs like these?

Mr. Cohen: They all don't say—

Judge Ricci: What do you want to put in the record?

Mr. Cohen: This is the size of the sign, we posted signs there of this nature.

Judge Ricci: What do you want the record to show, the size of the sign of what is written on it?

The Witness: The size of the sign, and the witness has testified what is written on them, speed regulations and no parking regulations. This is a typical sign.

Judge Ricci: I make this, if I am wrong correct me, this sign, 10 inches by 15, how does that look? Fine.

Miss Reporter, there is a stipulation between the General Counsel and the Respondent that there are signs around the parking lot saying various things. The first agreement is that the signs are about 10 by 15 inches. Right, you agree?

Mr. Mascotti: I agree.

Judge Ricci: It's a fact. That they say various things, as the witness has been describing. It is also agreed that one of them says, because I am reading from it:

"No Parking, Fire Lane, Tow Away Zone".

Do you agree there is a sign that says that?

Mr. Mascotti: I'll take it, yes.

[122] Judge Ricci: It's a statement of fact. Okay, Mr. Cohen?

Mr. Cohen: Yes, these are steel signs, yellow background and green writing of approximately 3 inches height.

Judge Ricci: Did he state the stipulation correctly?

Mr. Mascotti: It's okay, we'll get the sign in, I'll stipulate.

Mr. Cohen: If someone violates one of the regulations, these are regulations that have been established by whom, the city of Decatur or the North DeKalb Shopping Center?

The Witness: North DeKalb Center.

Q. (By Mr. Cohen): They decide on their own what those regulations should be, the speed and the places to park?

A. That's right.

Q. If somebody violates one of those regulations what, if anything, is done about it?

A. Well, we try to stop speeders, and we try to stop people who park wrong, and we do everything we can to avoid any type of action to cause any inconvenience for anybody that might be shopping at the center or visiting there. If we can't—in other words, sometimes the security stops a speeder and they warn them that if they persist then sometimes the DeKalb County Police will catch them.

Q. Do the Police have any special—Do the Police come out and patrol the property and come into the center?

A. They do not.

[123] Q. Will the Police come onto the center for any reason unless they are called to come out in their official duties?

A. No, sir, if some of these violations are flagrant, then we call the Police and they come. They come just like they would for any other property owner.

Q. Is there a sewer system maintained at the North DeKalb Center?

A. Yes, sir, there is.

Q. Who maintains that system?

A. The Center itself.

Q. Is there sanitation, trash removal system at the center?

A. Yes, sir.

Q. Is that done by the center—who pays for that service?

A. The center pays part of it and each merchant pays a pro rata share. They pay for their own trash removal.

Q. Does the center receive any kind of special consideration by law or by practice that a normal commercial property owner would not receive if he had a single retail store?

A. Not that I know of.

Q. Subject to the same health requirements and other regulations?

A. Sometimes we think they are a little stronger.

Q. Mr. Ballard has testified as to the policy of the center of not permitting someone to come on except to use the kiosks or the auditorium by permission. Are you familiar with that [124] policy?

A. Yes, I am.

Q. I take it you receive requests each week from groups trying to come out.

A. Yes, I do.

Q. Do you follow the same practice Mr. Ballard testified to?

A. As nearly as I can.

Q. Have you asked groups to leave who were on without permission?

A. Yes, I have.

Q. How do you ordinarily become aware that someone has come on without permission?

A. Usually I get a complaint from some of the customers, they call the mall office and they are being molested or inconvenienced, and I go out and approach the people and question them, have a discussion with them, get them out if I can. Tell them our policy, tell them what the alternative is, and the other routes they can take if they don't want to do what I ask them to do.

Q. Have there been instances where somebody has passed out literature, handbills without your permission?

A. Yes, sir, there has.

Q. Has that caused any increase in your maintenance cost?

A. Well, it causes two increases in two different ways. It causes extra problems with security because if they see [125] handbills under windshield wipers they try to catch the person putting them on and that takes them away from their duties inside the mall in providing security and protection for our customers and our clients, and at the same time it causes us to go out and pick these things up off the ground, sweeping won't pick them up. If they do and it rains on them they stick to the ground and you have to go around and pick them up by hand. We get complaints if the wind blows them on our neighbors property, they raise cain with us, call upon and say we are littering their property. And so, we do everything we can to make periodic checks on an hour or an hour and a half basis to see that no one is passing out handbills because it is easier to catch that way than it is to correct it after it is done.

Q. Could you give us an estimate of what the cost is of cleaning up after some of these groups that have come out without permission?

A. It will vary from $50.00 to $80.00 a time, depending on how far they got before they got caught. Sometimes they are less, many times they are less than that.

Q. Have they created any parking problems?

A. Well, you see, ordinarily on some days in the week the parking problems wouldn't be too great, but usually these people try to come on Friday and Saturday, our busy days. And they try to get in close and try to unload and they double [126] park, and that creates some problems. Sometimes they will try to hide and go into the courts, and when they go in courts that's where no one—

Q. What do you mean by courts?

A. Unloading the loading zones, 15 minute parking limits for loading and unloading to the stores. They will get in there, park in front of a dumpster or somebody's door and that cuts out service, and we have to go around and hunt these people up and try to find out what we can do about it.

Mr. Mascotti: Would you entertain an objection, Your Honor? All this is immaterial as far as this case.

Judge Ricci: You are absolutely right. I overrule your objection. At least I agree with you, but I overrule your objection.

Mr. Cohen: Have you enforced this policy against handbilling against any of the tenants of the shopping center?

The Witness: Yes, I have.

Q. (By Mr. Cohen): Tell us what happened.

A. Sometimes they want to put on a special promotion, Craft Shack and some of the various stores, and they will turn out these flyers and handbills and they will start out passing them in the mall, and we go around and take them down, go to the manager and tell him to call their representatives back in, it is absolutely not allowed.

Q. What about putting posters up on the store windows?

[27] A. We rip them down.

Q. Has that been uniformly enforced?

A. Uniformly enforced 100 percent.

Mr. Cohen: No further questions.

Mr. Mascotti: No questions.

Judge Ricci: Thank you, sir.

* * * * *

VERNER HALTER was called as a witness, by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

[128] Q. Prior to that time where were you employed?

A. H. Stockton Atlanta, Incorporated.

Q. Who is H. Stockton?

A. H. Stockton is a men's retail store in Atlanta.

Q. What location were you employed at?

A. North DeKalb Center.

Q. In what capacity?

A. I was manager-owner, part owner of that store.

Judge Ricci: This is one of the stores in this center?

[129] Mr. Cohen: Yes.

In that capacity as manager of the Stockton store in the center, did you serve in any capacity on the Merchants Association?

The Witness: Yes, sir.

Q. (By Mr. Cohen): What is the Merchants Association?

A. The Merchants Association is the governing body made up of merchants. Each person who holds a lease for retail purposes at North DeKalb Center is automatically a member of the Merchants Association. From that group certain members are elected to be on the Board of Directors of the Merchants Association, and this body, the Board of Directors is the govern-

ing body for the events and advertising and the expense incurred by each on the shopping center.

Q. That is a group known as the North DeKalb Center Merchants Association, as shown on this kiosk permit?

A. Yes, sir.

Q. That is Exhibit Number 19. I'm sorry, in what capacity did you serve in the North DeKalb Merchants Association?

A. I was a member merchant for one year because I had a store there, I served on the Board of Directors for two years, being elected by fellow merchants, and served as the president of the organization the third year.

Q. That was during the period of time before you become affiliated with David Bockle Associates?

[130] A. Yes, sir.

Q. Can you tell us how advertising done on behalf of the North DeKalb Shopping Center, what the relationship is between the Merchants Association and David Bockle Associates?

A. David Bockle Associates acts as a body to find promotions to bring to the malls in hopes that these promotions will increase the traffic. These promotions are then presented to the Merchants Association and they are either approved, altered or disapproved by the Association. If they are approved the Merchants Association also approves when they will be conducted and the expense we are allowed to incur to promote the promotion.

Q. In your capacity with David Bockle Associates and the Merchants Association, have you become familiar with the different ways in which the North DeKalb Shopping Center has advertised to get people to come to the center?

A. Very definitely.

Q. Are you familiar with promotions that have been held at this center?

A. Yes, sir.

Q. Can you tell us what different means of advertising DeKalb Shopping Center has utilized in recent years to draw people to the center?

A. Just about the gauntlet. We use radio, TV, billboard, direct mail, newspaper and circulars.

[131] Judge Ricci: And what?

The Witness: Circulars.

Mr. Cohen: Let's take each of these in turn. In the area of newspapers, what type of events have you placed ads for in the newspaper? We are talking about the North DeKalb Center, it's whole entity.

The Witness: Basically the newspaper things we do are for an identity of the shopping center, we don't break it down and advertise the individual stores. We try to create an image through the newspaper media for the entire shopping center. This could be a fashion show on the mall, it could be advertising a camping show on the mall. The purpose of this advertising is image oriented as well as traffic oriented. We hope by having these promotions people in the community in light of the promotion will feel good about the shopping center.

Judge Ricci: Will you please tell me, Mr. Cohen, so I can follow and understand what relationship does the company with the shopping center have to do with the union activity?

Mr. Cohen: My contention here is, Your Honor, there is a most important decision before you under the Board's Decision of December 29, 1972 in S. E. Nichols, (spelling) N-i-c-h-o-l-s, 200 NLRB No. 161 in a case of this nature, is whether the union had other means of access to the employees. It held that in a case almost identical to this, the controlling case is [132] Babcock and Wilcox Company, and that the consideration of Babcock and Wilcox, does the union have other effective means of reaching its audience. My argument then, Mr. Ricci, is this, that the center has been engaged in numerous ways in trying to get its message to people to come to the shopping center. The union had a message, don't come to the shopping center, at least don't come to one store at the center. The union could have utilized the very same means which would have been as effective if not more effective, which would have been as economical, if not more economical, which I am going to show

through this witness, as the means of picketing with the placard in front of Butler's Shoe Company. By virtue of having these means available the union thereby had access to its intended audience, the customers of the Butler's Shoe Store, and did not have to picket in the shopping center premises.

* * * * *

[134] Mr. Cohen: Mr. Halter, what newspapers have you placed advertisements in?

The Witness: We basically use two newspapers, we use the Journal-Constitution, which is the metropolitan Atlanta newspapers, and use the Decatur-DeKalb News, which is a weekly publication that happens to fall right in the center of our market area. It also happens to be the largest circulation of any weekly publication in the State of Georgia.

Q. (By Mr. Cohen): Were both of these newspapers utilized in the period around January 1971?

A. It would depend on the promotion around that date, I don't recall.

Q. Were they both in existence at that time?

A. Very definitely we were using them at that time.

Q. We have introduced in evidence Respondent's Exhibit Number [135] 2, which is a map of the greater Atlanta area showing you the portion of that map that has been marked, would all that area be serviced by the Atlanta Journal-Constitution?

A. Very definitely.

Q. Would it actually circulate in a larger area than is shown on that map?

A. Much large.

Q. And the second paper, the DeKalb-Decatur News, would it service the entire DeKalb County area as shown in Exhibit 22, the entire DeKalb County area?

A. Yes, sir.

Q. That would service that entire area?

A. Yes, sir.

Q. Did you prepare at my request yesterday a summary of the current figures, a summary of the current circulation of these papers, the cost of putting an ad in each of those papers, and the cost of reaching per thousand people through these papers?

A. Yes, sir.

Q. Were these taken from your records in your office?

A. Yes, sir.

Mr. Cohen: Would you mark this please, 24?

(The document referred to was marked for identification as Respondent's Exhibit 24.)

Mr. Cohen: I am showing you what has been marked as [136] Respondent's Exhibit 24, will you tell me whether the facts and data shown on that document were done under your direction and supervision?

The Witness: Yes, sir.

Q. (By Mr. Cohen): You have indicated, for example, the source for each one. Under total circulation audited for the Decatur-DeKalb News, as well as the Journal-Constitution, you have indicated SRDS, what does that stand for?

A. That stands for standard rate and data service. This is an independent agency who takes and certifies circulation of periodicals and we buy the service so that we can for our clients get the best buy for the circulation in a particular area. It also will give you a break out on the reader, it will give you the area he lives in, et cetera.

Q. This is the correct total circulation for each of those papers?

A. Yes, sir.

Q. And the rates, you indicated rate card, what is that?

A. The rate card is a card supplied by the publication itself that will give you the varying rates they offer depending on how many ads you run and the size of the ad, et cetera.

Q. What you have indicated is the cost of a half-page ad, 500 inch rate is the rate shown by that rate card?

A. Yes, sir.

Q. Then the cost per thousand is a division of one item of [137] the total circulation into the cost of the page ad?

A. Yes, sir. So in essence, to reach a thousand people at this rate it would cost you $3.50.

Q. Those are current rates as of yesterday?

A. This is our latest rate book, which we just received the first of last month.

Q. Do you know if there has been any significant change in the circulation or the rates since 1971?

A. Yes, sir.

Q. What is that?

A. Both have gone up.

Q. Both have gone up, do you know to what degree?

A. Population increase I couldn't say. The rate itself has probably gone up 50 cents.

Mr. Cohen: I would now like to offer Exhibit 24.

Mr. Mascotti: No objection.

Judge Ricci: I'll take it. I receive the Respondent's Exhibit Number 24.

(The document referred to, heretofore marked Respondent's Exhibit 24, was received in evidence.)

Judge Ricci: Cost of advertising.

Mr. Cohen: Newspaper advertising.

By the way, has newspaper advertising been an effective or ineffective method of drawing potential customers to the center? [138] The Witness: It really depends on the promotion itself, but it is generally a very good means of drawing increased traffic to the center.

Q. (By Mr. Cohen): Visual means, head counts or otherwise ascertain that more customers have been attracted to these various events by means of newspaper advertisements?

A. Yes, sir.

Q. You have also indicated that another means that you have used has been television. Do you use any particular channel?

A. From time to time we have used almost all of them except one, the primary station we use is WSB-TV.

Q. Is that a large station or not so large?

A. That's the biggest television station in audience reach and also expense.

Q. On what types occasions would you use WSB-TV?

A. Here again, we use them more for a general nature, that is image, to build image, and we would use this like the newspapers, we would use it to promote a camper show or to promote a promotion we would have on the mall that we would want—we would feel would be of interest to total population in Atlanta. For example, an antique fair. We would use it to promote something of that nature that would be unique to the Atlanta area.

Q. Is there any source that will show the area which WSB-TV would serve, number of families?

[139] A. Yes.

Q. What is that source?

A. The Nielson.

Mr. Cohen: Would you mark this Exhibit 25?

(The document referred to was marked for identification as Respondent's Exhibit 25.)

Mr. Cohen: I am going to show you Exhibit 25. Is this an accurate representation of the Nielson ratings for WSB-TV for October 26 through November 22, 1972?

The Witness: Yes, sir.

Q. (By Mr. Cohen): It shows under table 1 the number of families reached by the station?

A. Yes. If you can read it, it's there, it didn't duplicate well.

Q. That is current?

A. That is current.

Q. Nielson is used by you in the regular course of your business?

A. It's just like SDRS, it's a service we get to give us the number of people reached at certain times of day, breakdown

of the stations, their audience at certain times of the day, and buys. How we can best spend our money.

Q. In 1971 did WSB-TV reach approximately the same area as shown on this exhibit 25?

A. Exactly the same area.

[140] Mr. Cohen: I would offer Exhibit 25.

Mr. Mascotti: I have no objection to what it purports to represent.

Judge Ricci: I receive number 25.

(The document referred to, heretofore marked Respondent's Exhibit 25, was received in evidence.)

Mr. Cohen: Did you also in the case of WSB-TV make a similar compilation that you could use in the case of the newspapers as to how much a quarter hour—I'm sorry, a 30-second spot would run and the cost per thousand?

The Witness: Yes, sir.

Mr. Cohen: Would you mark this Exhibit 26?

(The document referred to was marked for identification as Respondent's Exhibit 26.)

Mr. Cohen: I am showing you Exhibit 26. Was that prepared under your direction and supervision?

The Witness: Yes.

Q. (By Mr. Cohen): Are the figures taken there the average quarter hour audience from the current Nielson rating?

A. Yes, sir.

Q. Was the cost of a 30-second spot taken from the same rate cards, same as the newspapers?

A. Yes, sir.

Q. The other final figures were arrived at through the process of diving one into the other?

[141] A. Yes.

Q. So that you got the rate per thousand?

A. Right.

Q. How would those figures compare to the figures that would have existed in 1971?

A. Well, again, the population would be less.

Q. The population would be less or more?

A. Population in '71 would be slightly less than it is now, but so would the rate.

Mr. Cohen: I would offer Respondent's Exhibit 26.

Judge Ricci: Let me see if I, whoever is going to read this transcript after me, can understand what is going on. We are looking at Number 26. Up on the top it says:

":30 spot, late news, week night".

Does that ":30" means half a minute?

The Witness: Yes, sir.

Judge Ricci: Does it mean then that this sheet, run down refers to a cost of a 30 second commercial advertising on television late at night during a news program?

The Witness: Yes, sir; local, not national.

Judge Ricci: Of course, in Atlanta.

The Witness: Yes.

Judge Ricci: Further down a little bit where it says cost per thousand, does it mean this, that if you arrange to have a 30-second advertising spiel on such a program on a [142] Washington television station—

Mr. Cohen: Atlanta television station.

Judge Ricci: Atlanta television station, the cost to the advertiser would be $1.65 for every thousand persons it reaches with that 30-second spot.

The Witness: Yes, sir.

Judge Ricci: And the 30-seconds would cost in Atlanta to whoever wants it $255.00.

The Witness: Yes.

Judge Ricci: But in view of how many people there are and what they scientifically know as the number of people who watch television at that hour at that station and so on, it costs $1.65 for every one thousand that you reach.

The Witness: Yes.

Judge Ricci: Would that approximately be about the meaning of the other meaning that you have that compared this as to newspapers?

The Witness: Yes.

Judge Ricci: Thank you. I receive this number 26.

(The document referred to, heretofore marked Respondent's Exhibit 26, was received in evidence.)

Mr. Cohen: In addition to using the single 30-second spot, has the North DeKalb Shopping Center also contracted for multiple spots appearing at different times during the day?

[143] The Witness: Yes, generally that is the buy we would make.

Mr. Cohen: Would you mark this Exhibit 27, please?

(The document referred to was marked for identification as Respondent's Exhibit 27.)

Mr. Cohen: I am going to show you what has been marked for identification as Exhibit 27. This indicates the Back to School advertising conducted in August 1972. Was this done by the North DeKalb Center?

The Witness: Yes.

Q. (By Mr. Cohen): It appears on here the different audiences and the time of the spot, the audience reached on each of those particular days.

A. Right.

Q. How was that audience computed?

A. I don't understand the question.

Q. How was the figure arrived at for the audience at that particular time?

A. That's taken from Nielson.

Q. Then you came up with the total audience, the cost is shown below, it's $2165 gross charge.

A. Yes.

Q. That was divided through to get the rate of 78-cents per thousand.

A. Yes.

[144] Q. So the cost of using multiple spots then is considerably less than using a single spot?

A. Oh, yes, yes.

Q. Is this a representative type of multiple spot engaged in by the center?

A. Right. Our reason for making a buy such as that is that generally we go for the total market which you don't necessarily do with a late night news program, so that could catch the housewife at home at 3 o'clock in the afternoon, or the morning, before 7 o'clock in the morning when she is fixing breakfast, and 11 o'clock at night. It's a full spectrum.

Mr. Cohen: I offer Exhibit 27.

Judge Ricci: I'll take it.

Mr. Mascotti: No objection.

Judge Ricci: I take Number 27 into evidence.

(The document referred to, heretofore marked Respondent's Exhibit 27, was received in evidence.)

Mr. Cohen: By the way, these rates are quoted for WSB-TV would they be higher or lower for one of the other television stations with which you deal?

The Witness: That would be lower for the other stations. WSB is the most expensive TV station in Atlanta.

Q. (By Mr. Cohen): How effective is television, how effective has it been in drawing people to the North DeKalb Shopping Center?

[145] A. Extremely effective.

Q. That has been demonstrated by head counts and visual observations?

A. Yes.

Q. You testified that you also use radio on occasions. Is that used frequently or infrequently?

A. Frequently.

Q. What type events would you use radio for?

A. Again, we would use it for camping sale, we would use them for a fashion show, we would use radio for a promotion

such as Millionaire for a Day, which is a give-away that we do for some shopper that comes out and puts her name in a box and we make her a Millionaire for a Day.

Q. Did you recently have an antique show at the center?

A. I'm sorry, I can't hear you.

Q. Did you recently have an antique show at the center?

A. Yes.

Q. How was that promoted?

A. The antique show was promoted on WSB-radio, AM and FM.

Q. Was it—I'm sorry, was that a successful advertising campaign?

A. I wish they were all that successful.

Q. Your answer is yes then?

A. Yes, very definitely.

Mr. Cohen: Would you please mark this as Exhibit 28?

[146] (The document above referred to was marked for identification as Respondent's Exhibit 28.)

Mr. Cohen: Showing you Exhibit 28, it is a map by something called the American Research Bureau. Would you tell us what that is and what that map depicts?

The Witness: Well, it's another service that we purchase, that will give you a breakdown on the media that you are trying to reach through a particular means. In this case it happens to be radio. And this shows the area that WSB radio reaches. You can see the metropolitan area, immediate metropolitan counties, a number of counties, some of them going as far over as Alabama.

Q. (By Mr. Cohen): So that WSB-TV and WSB radio would reach a much larger audience than just the greater Atlanta area?

A. Very definitely.

Q. Is this an accurate reproduction of records you keep indicating the number of people serviced by WSB radio?

A. Yes.

Q. Would this have been the same or different in 1971?

A. Again, it would have been the same as far as the power, as far as where they reach, but their rates would have been less.

Q. And the number of people reached?

A. Would have been less.

Mr. Cohen: I offer Exhibit 28 at this time.

[147] Judge Ricci: I receive it into evidence.

Mr. Mascotti: No objection.

(The document referred to, heretofore marked Respondent's Exhibit 28, was received in evidence.)

Mr. Cohen: Would you mark this please? It's the last one, Number 29.

(The document above referred to was marked for identification as Respondent's Exhibit 29.)

Mr. Cohen: I show you what has been marked as Exhibit 29. First of all, look at the second and third pages. Can you tell me what these pages are?

The Witness: This is a contract for a buy and gives you a schedule on WSB radio, one is AM, one is FM.

Q. (By Mr. Cohen): What is that particular event that that is a contract for?

A. This is for the antique fair we just had.

Q. This is a contract between North DeKalb Center and WSB radio?

A. Yes.

Q. What indicates when the spot announcements are made on the radio, 60-second announcements were made at the times shown on each of those documents?

A. Yes.

Q. And the cost of the 60-second spot, the 12 spots is the figure reflected below, $783.00 for AM and $216.00 for the FM?

[148] A. Yes.

Q. Is the front page then a compilation from your records indicating the audience reached by those spots, the cost and the

cost per thousand computed in the same way you did for newspaper and television?

A. Yes.

Q. This was taken from your official records that you keep in the course of your business?

A. Yes.

Mr. Cohen: I offer Exhibit 29. I might explain that is a Tap Plan.

Tell us what a Tap Plan is.

The Witness: A Tap is an abbreviation of the station for what is called Total Audience Plan. That plan is to guarantee you one-third of your spots to run in what they call prime time and they let the other spots fall where they may, so you get the total audience. You may not just reach the drive customer, it may be on at 3 o'clock in the morning or 6 o'clock in the morning, but they guarantee at least a third of your buy will occur in what is called drive time.

Q. (By Mr. Cohen): Or prime time?

A. Prime time.

Q. This is the plan normally used by North DeKalb Shopping Center?

A. Right, because we shotgun the market, we go after every [149] facet of consumer, not just the man who may be driving to or from work.

Judge Ricci: They offered that one too.

Mr. Mascotti: All right, I don't object.

Judge Ricci: Consistency above all. I receive Number 29 in evidence.

(The document referred to, heretofore marked Respondent's Exhibit 29, was received in evidence.)

Mr. Cohen: By the way, are the rates for WSB-TV higher or lower than other radio stations?

The Witness: The TV?

Q. (By Mr. Cohen): Radio, excuse me.

A. Yes, they are higher than other comparable stations with the same market.

Q. How effective has radio been in attracting customers to the mall?

A. Very effective.

Q. Can you ascertain that by independent checks?

A. Yes, sir.

Q. You indicate also that you on occasion use direct mail.

A. Yes.

Q. What type of events would you utilize direct mail for?

A. Direct mail would be a seasonal sale we are going to have. We would put together a circular and then mail the [150] circular out and in the circular it would be institutional oriented for the shopping center, and then each merchant, if he chooses, can add his own ad for his own product or products, inserted in the circular.

Q. To what area would you mail this?

A. This would go to our immediate shopper, or to our immediate area surrounding the shopping center.

Q. Did you at my request yesterday find out the rate, the cost of such a distribution?

A. Yes.

Q. Could you tell us what that is, please?

A. It depends, of course, on the size of the article, but we buy a bulk rate for $45.00 from the Government, and then you are charged 4½ cents per item mailed.

Q. Do you remember the cost for any particular distribution?

A. Well, this would be a rough figure, I think we did one for about 50,000, it cost something like $3,500.00.

Q. To reach 50,000 families?

A. Yes.

Q. By the way I don't know if we clarified it, but the figures shown on the exhibits, radio, newspaper and television exhibits,

that's numbers 29, 24 and 26. The number of 156,000 for example on number 26, are those families or persons?

A. Those are persons over 12.

Q. What about on the newspaper one?

A. That would be families.

[151] Q. The 70,000 figure for the Decatur-DeKalb News would be 70,964 separate families?

A. Yes.

Q. When you said you distributed the handbills for $3,500.00 to 50,000 you meant 50,000 separate households?

A. I'm sorry, can we shut that door? I keep getting—

Q. You said recently you sent out a mailing of $50,000. It was 50,000 separate households for a cost of $3,500.00?

A. Yes.

Q. By the way, was that rate lower or higher in 1971, as far as you know?

A. In 1971 it would have been lower.

Q. Another means you indicated—

A. Could I inject one thing? In that rate I have just given you is also the printing document.

Q. That would be all the printing and—

A. That would take the whole package.

Q. I see. You also indicated that on occasion you used handouts.

A. Yes.

Q. Could you tell us what you used those for and how you have used them?

A. That is done strictly as an institutional type thing. We offered a listing of the local fire department, the local Police Department, Ambulance Service, the shopping center. and [152] each resident in the shopping center, showing his phone number. And we would go to a high density area for population, such as an apartment complex, and we would offer this to everyone who lived in the apartment complex. Then we would

give it to the resident manager, and when someone moved in they would offer it to whoever moved into the apartment.

Q. Do you have the cost of a typical type distribution like that of handouts that you have engaged in?

A. I think the last one ran around $1,000.00.

Q. How many different circulars did you hand out, how many families did you reach?

A. 3,000, I think .

Q. Finally, the last source that you mentioned for advertising with billboards. What type billboards have you used?

A. We have used two billboard programs, one in conjunction with two other regional shopping centers, and there we bought again what is called a package, which consisted of, I think, 70 billboards, if my memory serves me. And they were located all over the metropolitan Atlanta area, so that the billboard was never in the same place for long. It continually moved. We promoted the shopping center in that way. I think that program cost, our share was $750.00.

Q. There were two other centers?

A. Two other shopping centers picked up a proportionate share. We are currently using one billboard on the Perimeter, [153] which is a superhighway. The sign is preceding the exit to our shopping center, and we just use that as institutional to show our theme which is "Good Old Fashioned Hospitality", and also promote our big anchor store, which is Rich's, which is the big retail store in Atlanta, Georgia, which our competitor up the road does not have.

Q. Now, in addition to the—

Judge Ricci: How long does a big sign advertising a shopping center, when it goes on a billboard, how long does it stay on that one billboard?

The Witness: It depends on the plan you have got.

Judge Ricci: I mean, your general experience. I doubt anyone would go to the trouble of putting up a big sign on a billboard and take it down the next day.

The Witness: The one we have now we get two panes a year, and it runs for six months.

Judge Ricci: In other words, generally when a big sign is put up on a billboard to advertise a shopping center it will stay up there about six months?

The Witness: Right.

Judge Ricci: Is the argument of the company in this case that the Union could have put up a sign instead of these pickets for six months on a bill board?

Mr. Cohen: You Honor, I have personally seen signs that unions have put up to promote their unions, I have heard radio [154] advertisements that the Retail Clerks and other unions have put out, I have seen television broadcasts, and I think any of these devices that I mentioned would have been available, some are obviously more available then others. But I am attempting to show that there is a variety of media available and what the cost of that media is.

Mr. Halter, you described the major sources of media used by the North DeKalb Shopping Center. Have you advertised in any other ways, without getting into details, just describe some you or other centers which are your clients?

The Witness: Yes. In the shopping center promotion business we have run again the gauntlet, we have run an airplane over the Atlanta Stadium during a Falcons football game carrying a banner to shop at North DeKalb Mall which reached 56,000 people, that's how many people were at the Stadium. We have flown Santa Claus in in a helicopter, we have a 4th of July fireworks show which is nothing but public relations because it is after the center is closed. It certainly does not draw a shopper, it just draws a man who sits in his car and watches the show, but we feel it is a community oriented type thing which helps our image. And one center here brought Santa Claus in in a hot air balloon. So it's as wide as the imagination as to what else you can do. We did glass reclamation in the parking lot, which was another thing that didn't have anything to do with the shopper.

You just brought your [155] glass and threw it away and we took care of it from there.

Q. (By Mr. Cohen): What was the reason for doing that?

A. Strictly goodwill, strictly promotion within the community.

Q. Did you hold promotions to draw people to the center at all?

A. Very definitely.

Q. How do you describe a promotion, how would you describe the type event you would hold on the shopping center itself? Mention several things.

A. There are a variety of things, we have some that are strictly public service oriented. Each year we have the DeKalb County school system science fair that is strictly an expense but strictly for image purposes. We really don't gain shoppers out of that. Then we have promotions that do gain shoppers, such as the Antique Fair which we have just concluded, which filled the mall to capacity, you could hardly walk in the mall. Some of these we go out and do. The public service things we will work with the school system coordinating this, go through the expense of advertising it, the whole bit, it's a public service. On the other hand, there are some promotions where the promotion will come to us. We will screen it, see if it can be done, see if we co-op the advertising with the promoter or whether we do it ourselves, and then we take it to the Board of Directors, they approve it, tell us when to have [156] it, and we put it on.

Q. In each of these cases that you have mentioned, was there an arrangement made with the people holding it as far as security, insurance, maintenance and so on?

A. Exactly. If it involves a potential or a real customer in the mall participating in the event, then they have to carry liability, although the individual stores as does Scott Hudgens Company have insurance on the shoppers. Security indicates, of the Antique Show, it was necessary for us to increase security because these people left their antiques on the mall, so we had

the expense of adding security to what is already—or to the security staff that already exists.

Judge Ricci: They paid for this additional cost?

The Witness: Yes.

Mr. Cohen: Has the North DeKalb Shopping Center ever advertised or promoted by means of having someone march up and down with a placard or picketing?

The Witness: No, sir.

* * * * *

[157] Mr. Cohen: You indicated that the North DeKalb Shopping Center has never advertised by having someone march up and down holding a placard saying go to North DeKalb Shopping Center, or something else. My question is, why hasn't that device been used, you have used all these other devices.

The Witness: Well, one reason is I just indicated we spend a fortune, approximately $50,000 a year to create an image. We don't feel that would be conducive to our image. Second of all, for the advertising money spent we would only be reaching the people on the mall who are already there, that would not help us increase our traffic. So what we do is go [158] outside of this means to try to reach people who are not already at the shopping center.

Judge Ricci: When you said it was not consistent with the image you tried to create, would a paraphrase of what you said simply be very briefly, to have a picket walk up and down in such an elegant place would not look nice?

The Witness: No, not necessarily.

Judge Ricci: Is that a fair paraphrase of what you said before?

The Witness: Not necessarily.

Judge Ricci: Tell us what you mean by it would not enhance an image.

The Witness: Well, as I indicated some time back, our image right now is good old hospitality. What we have tried to do is produce through advertising and through cooperation with the

merchants an atmosphere of relaxed shopping pleasure. And we feel like the addition of people on the mall carrying signs would interfere with traffic and access and egress into shops and/or the center. And basically, it would relate back to dollars again, that is just not a good expense of money, you can do so much more with people that are not already there. Our purpose is not to reach the people who are shopping, our purpose is to reach the people who are not shopping.

* * * * *

[160] Judge Ricci: No. Do you think that picketing with a sign up and down is a more efficient, economical way to advertise than all these wonderful ways you have been telling us?

The Witness: I would depend, of course, on how much money you had to spend.

* * * * *

[162] Mr. Cohen: I will ask the witness one more question and then I am done for the day.

Again, I would ask you the question that I posed before, if I wanted to publicize a dispute at eight or nine locations in the Atlanta area, and wanted to hire people to engage in picketing in the month of January at retail store locations, how would that means of publicizing my disagreement compare [163] with using one of the other media that you have testified to? Either efficiency, economy or otherwise.

The Witness: Again, can you tell me how much money you are talking about?

Q. (By Mr. Cohen): I am saying I'm going to pay four people at nine locations for five days, pay $400.00 or $500.00 or $1,000.00 to do that.

Mr. Mascotti: Are you asking him which is cheaper?

Mr. Cohen: I'm asking him would that be an efficient use of my money to publicize the dispute.

Mr. Mascotti: I object.

Judge Ricci: It's an opinion. It depends on so many variables that I would consider his answer meaningless, but if Mr. Cohen thinks it should be in the record, how do you answer it?

Mr. Cohen: I want it in the record.

The Witness: I would think it would be an inefficient way to spend your money.

Q. (By Mr. Cohen): Why is that?

A. Well, let's take the period for one thing. January is, not just in Atlanta but in the country, a very slow retail period simply because most people are recovering from Christmas or December, which is the peak. After the peak, obviously you are going to have the valley, and that is January and February. So you have a very low traffic count and I assume you want to [164] get your message across to who could read the sign. There is no hig' intensity of traffic at that period, you are going to get your message across to very few people. You could take that same amount of money, the figures now escape me, they are here in the evidence, you could take that same amount of money, buy a half-page or two half-page ads if you are talking about $1,000.00 in Decatur-DeKalb News and reach 70,000 people twice, that would be 140,000 people. One thing as an advertising man I would say is you can tell a story and advertise it, but it is difficult to tell a story on a placard, to efficiently deliver your message.

Judge Ricci: You would be amazed. You would be amazed how a placard with two words on it tells a more precise story than three pages in a newspaper.

Mr. Cohen: Mr. Ricci, I object to that comment.

Judge Ricci: Of course you do.

The Witness: Could I reply to his comment?

Judge Ricci: Yes, sir, you may.

The Witness: I would consider the area of the country you would be living in.

Judge Ricci: And you are right, sir.

Do you have any other—Did you finish your answer to the question?

The Witness: Another thing I would say is that you could take that $1,000.00 and buy one of these total audience plans on the radio station, either AM, FM or both, on WSB, with a [165] total market area that is far outside of Atlanta. Let's say whoever you are having the argument with has stores outside the metropolitan Atlanta area, but you were not really concerned with them, you were concerned with the ones here. You could still deliver the message to a greater market area on TV or radio by buying one of these total audience plans for $1,000.00 or $1,200.00, it depends on the amount of money you have got to spend. At cost per thousand you can do a much better job in newspaper, radio or TV.

Mr. Cohen: I have no further questions.

* * * * *

[167] *Redirect Examination*

Q. (By Mr. Cohen): To your knowledge, Mr. Halter, have unions gone to other advertising agencies and utilized media to communicate messages, as well as engaged in picketing?

A. Yes.

Q. That would include radio, television, newspaper and otherwise?

A. Yes.

Q. In the current Atlanta area?

A. Yes.

Judge Ricci: Thank you.

Mr. Mascotti: Wait a minute. To his knowledge?

Judge Ricci: He said he heard that unions had gone to other advertising agencies.

Mr. Mascotti: He says he knows that, it's a fact.

Judge Ricci: He heard that.

Recross Examination

Q. (By Mr. Mascotti): You heard that or you know that is a fact? Do you know that as a fact, that unions went to other advertising—

Mr. Cohen: That was not the question. I asked if unions used other media to his knowledge.

Judge Ricci: Oh, have unions advertised labor disputes by means other than picketing?

Mr. Cohen: That's correct.

[168] Judge Ricci: Your answer is yes?

The Witness: Yes.

Judge Ricci: We all know that. Okay, thank you.

(Witness excused.)

Mr. Cohen: I have no further witnesses.

* * * * *

[170] Mr. Cohen: I just want to make one statement, Mr. Examiner. I intend to tell General Counsel this because it was not contained in our other documents. We filed, of course, statements of position with the Board. I will incorporate those in my brief to you, but there is one, the Nichols case that I mentioned earlier, came out after those cases came out. I think it is the only opinion I have seen of the Board which deals with Board law on shopping center picketing.

Judge Ricci: Is that 82 LLRM?

Mr. Cohen: 200 NLRB No. 161.

Judge Ricci: Joe Nachman.

Mr. Cohen: Joe Nachman, that's correct. I think that is a significant case, I want General Counsel to be aware of it.

* * * * *

SUPPLEMENTAL APPENDIX OF THE NATIONAL LABOR RELATIONS BOARD

Supreme Court, U. S.
FILED
JUL 7 1975
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-773

SCOTT HUDGENS, An Individual,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,
Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 20, 1974
CERTIORARI GRANTED MARCH 17, 1975

Supreme Court of the United States

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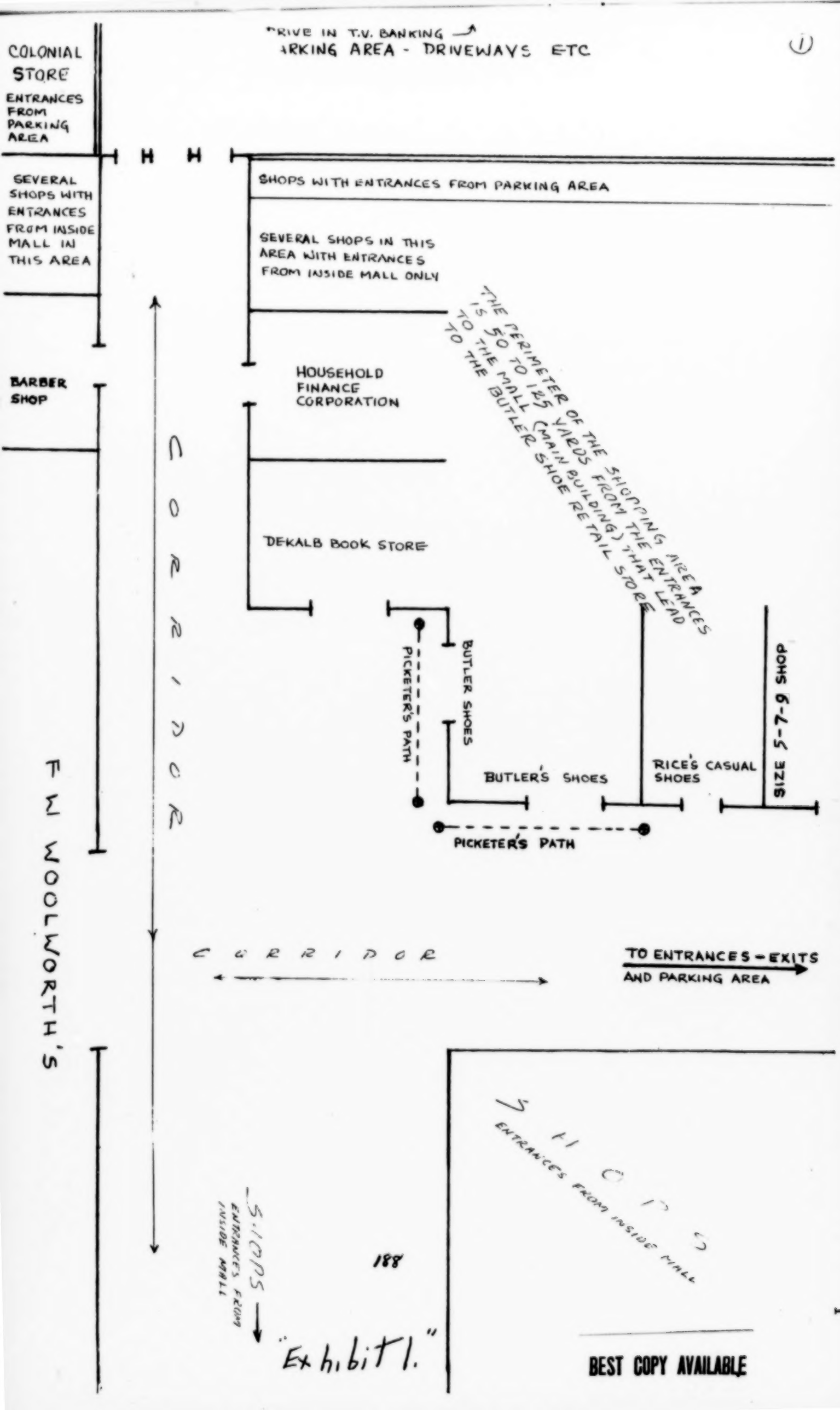
* The Board is filing a separate appendix because some of the exhibits in the joint appendix have not been reproduced in a clear fashion. "J.A." references are to pages of the joint appendix where the exhibit appears.



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"Exhibit 1."

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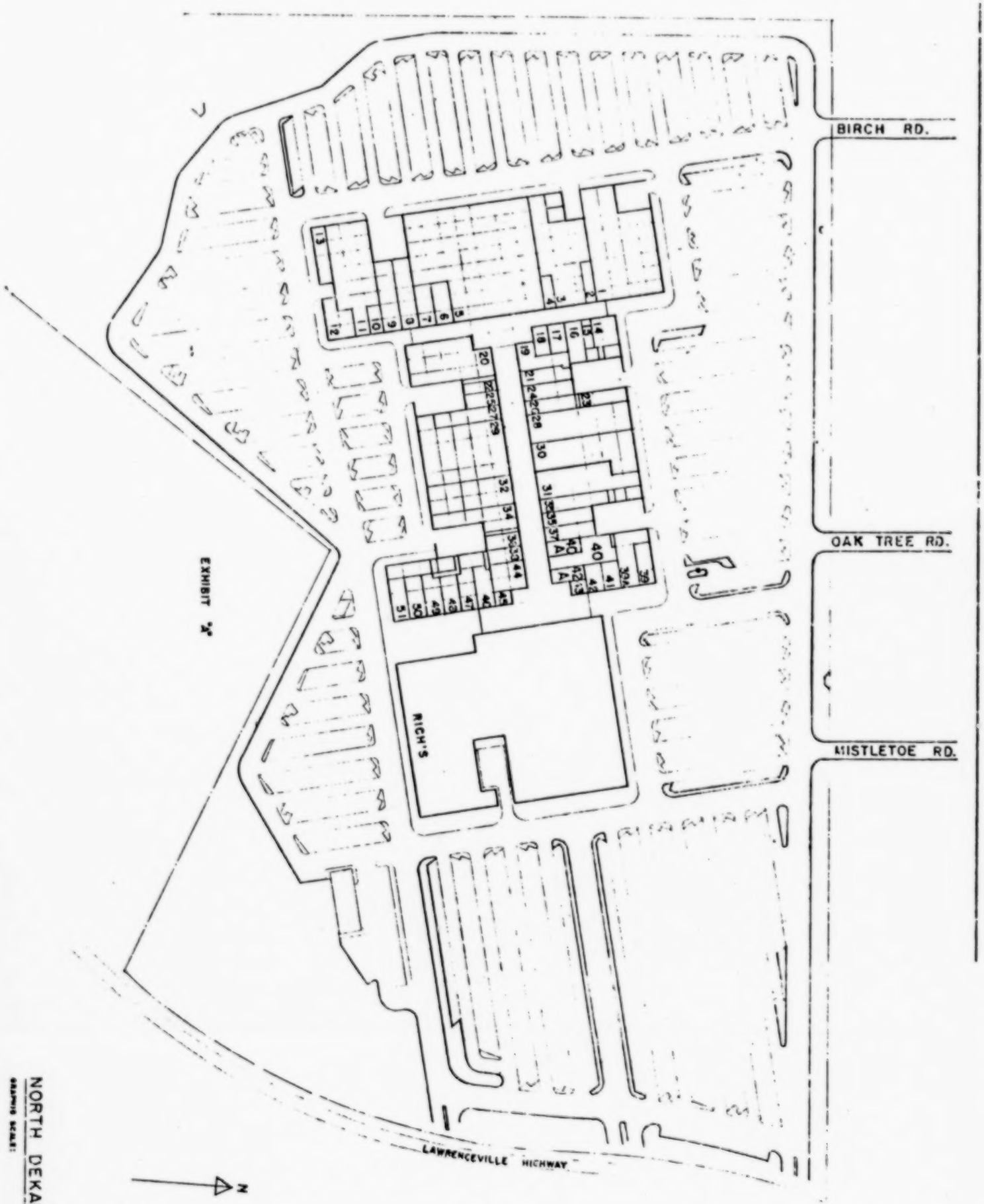

NORTH DEKALB CENTER

"Exhibit 2."

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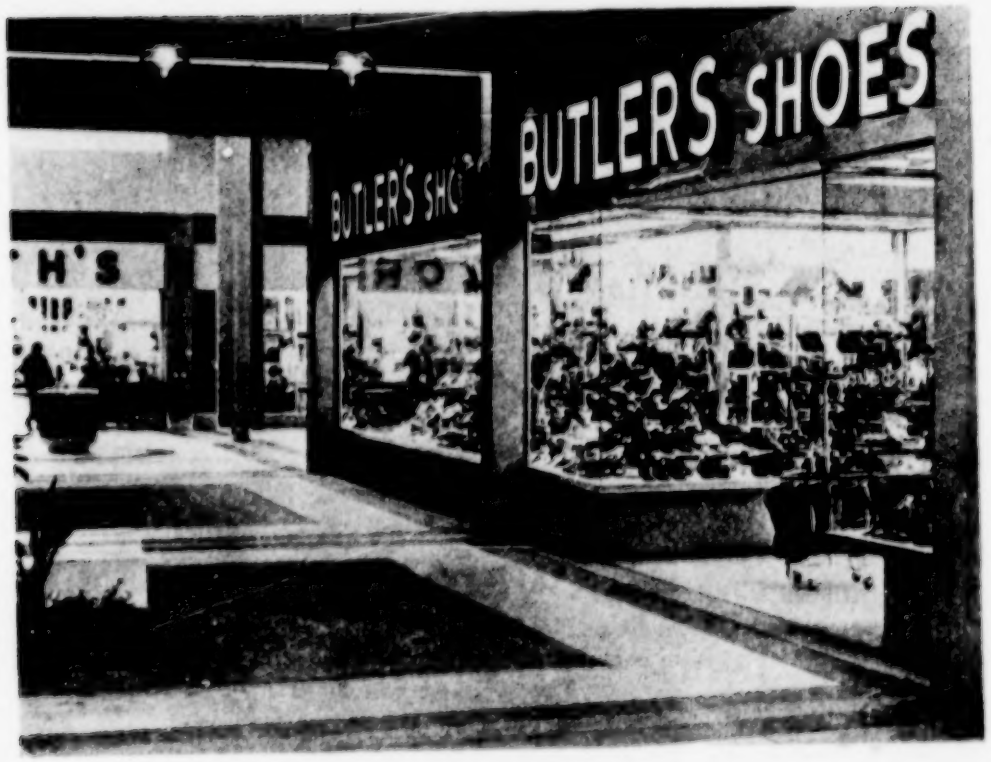
RESPONDENT'S EXHIBIT #1



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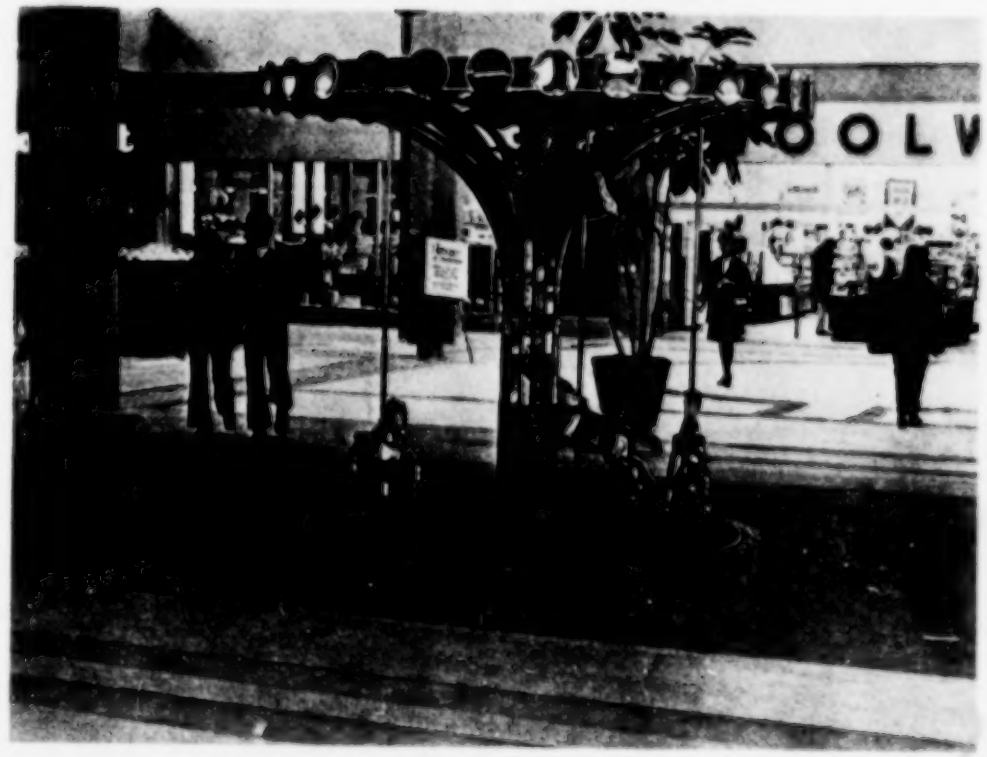

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-773

SCOTT HUDGENS, AN INDIVIDUAL,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONER.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONER.

INTEREST OF THE AMICUS.*

1. The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in

* There have been lodged with the Clerk of the Court the written consents of the parties to the captioned proceeding to the filing of this *amicus brief*.

excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

2. The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.**

The question presented in the instant case is a matter of continuing importance to the Chamber and a question not yet reivewed by this Court. Briefly stated, that question is: under what circumstances must the constitutional right of private property yield to allow picketing when the underlying labor dispute does not originate on this property and does not concern the business operations or labor relations at that property of the property owner or any tenant.

This is an issue which is of particular concern to the Chamber and its members since any rule which may emerge will necessarily exert an enormous impact on those members' rights and, potentially, on their manner of doing business.

The Chamber is, by virtue of its interest in this area, in a position to urge views upon this Court which neither party has argued.

** *E.g. N.L.R.B.* v. *Textron, Inc.*, ... U.S. ....., 85 LRRM 2945 (1974); *Geduldig* v. *Aiello, et al.*, ... U.S. ....., 8 F.E.P. Cases 97 (1974); *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971); *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213, 34 L. Ed. 2d 422 (1972); *Boy's Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970); *Sears Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U.S. 655 (1970); *Super Tire Engineering Co., et al.* v. *McCorkle, et al.*, ... U.S. ....., 85 LRRM 2913 (April, 1974); *N.L.R.B.* v. *Mobil Oil Corp.*, 482 F. 2d 842 (1973); *N.L.R.B.* v. *Frank Visceglia and Vincent Visceglia t/a Peddie Buildings*, ... F. 2d ....., 86 LRRM 2541 (CA 3, 1974); *Scott Hudgens* v. *N.L.R.B.*, ... F. 2d ....., No. 73-3264 (CA 5, 1974).

With respect to the wide-ranging impact of any decision which may be rendered here on the rights of the Chamber's members, it should be noted that shopping centers can be of practically any size ranging from a collection of large national retail operations to local, neighborhood centers with but a few small independent stores. In fact, the characteristics of a shopping center do not materially differ from other types of retail enterprises, such as discount houses or large department stores, which are not generally regarded as "shopping centers". The interest of the Chamber is thus predicated on the substantial consequences that any decision here may have for *all* methods of retail operation. Indeed the Chamber's concern extends beyond retail operations to even nonretail property such as was involved in *Peddie Buildings, supra.* The Chamber is also concerned about the impact on its members' legitimate business interests of the adoption of a requirement, sought by the Board, that by opening their property to business invitees they thereby necessarily become constitutionally obligated to permit their property to become a battlefield for a variety of controversial competing uses to the detriment of their businesses, without regard for the preservation of their own rights or the actual communication needs of others.

SUMMARY OF THE ARGUMENT.

This case presents a significant and recurring question which as yet has not been decided by this Court. Here this Court is asked to define when private property rights must yield and permit the intrusion of expressive or protest activity where the underlying labor dispute does not originate on the property and does not concern the business operations or labor relations at this property of any facility. Thus, while the pickets here sought access to Hudgens' center, a privately owned shopping center, to picket a retail outlet of Hudgens' tenant, Butler Shoe Co., the underlying labor dispute originated at and concerned only the labor relations of Butler's nonretail warehouse which was *not* located on Hudgens' center. This case, then, concerns the accommodation to be made between the rights of property and

expression when the purpose of the expressive activity is not directly related to the business of the private property.

This Court has considered the accommodation between these competing rights when the labor dispute originated on the shopping center and was, therefore, directly related to the business of the center. (*Logan Valley*, 390 U.S. 308, 1968.) This Court has also prohibited expressive activity from taking place on a private shopping center when the purpose of this activity was wholly unrelated to the center's business. (*Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 1972.) However, this Court has yet to pronounce a rule in the indirect relationship situation presented here.

The Chamber submits that a proper accommodation of the competing rights here in question requires initially a distinction between expressive activity that is directly related to the property's use and that which is indirectly related. In the former situation where the dispute originates on the property to be subjected to the protest, the property owner or his tenants can forestall or curtail this dispute by changing their mode of operation. In the latter situation, as here, where the dispute originates and is centered elsewhere, neither the property owner nor any tenant who will be subjected to the protest activity can effect the scope or duration of this activity by altering methods of operation. While the Chamber believes that in either situation expressive activity should be permitted to encroach on to private property only if alternative public forums are lacking, the Chamber submits that the proof concerning the absence of alternative forums must be greater and more compelling in the situation where the purpose of the expressive activity is but indirectly related to the property's business. That is, since the users of the private property to be subjected to protest activity indirectly related to the property's purpose have no control over the duration or scope of this activity (except by excluding the protesters) there should be no occasion to open this property to such activity absent a conclusive demonstration of a compelling need due to the lack of alternative public forums.

The Chamber believes that this standard or rule appropriately balances the interests at issue in this proceeding and urges its adoption by this Court. An analysis of the record below utilizing the standard proposed by the Chamber demonstrates that the property owner, Hudgens, lawfully excluded the pickets from his property since these pickets did not demonstrate the lack of alternative public forums. The court below failed to distinguish between expressive activity that was directly related to the business of the property and activity that was but indirectly related and, accordingly, reached the decision that did not give due regard to private property rights.

In addition, the court below erred by failing to recognize that effective alternatives to direct picketing on private property do exist and should be employed especially where the purpose of the protest is indirectly related to the property's business. Indeed, due to the particularly intimidatory effect of picketing, this Court should require strict and compelling proof by those who desire to picket on private property that alternative forums or alternative methods of communication are not adequate. Only after such a strict demonstration should private property be opened to consumer picketing, particularly where, as here, the underlying labor dispute did not originate on this property and was not directly related to the property's business.

The need for this Court's pronouncements in this area is great due to the proliferation of shopping centers and the attempted use of this property by labor organizations and others for protest activities.

ARGUMENT.

A. This Court Has Not Considered the Accommodation to Be Made Between Private Property Rights and Expressive Activity Which Is but Indirectly Related to the Property's Business.

The Employer, Scott Hudgens, owns a sixty store retail shopping center which draws its customers from the metropolitan Atlanta area. This center consists of a single large building con-

structed around an enclosed mall and surrounded by a parking lot. Five driveway entrances lead into this parking lot. Hudgens has an abiding interest in the commercial success of the center's tenants since its rentals are based upon their gross sales. Among Hudgens' tenants is a retail outlet of Butler Shoe Company.

In January, 1971, nonretail employees of Butler employed at its warehouse that is not located on Hudgens' property engaged in a strike protesting the warehouse's failure to reach agreement on a contract with a union. In order to support this strike, the Union determined to picket Butler's retail outlets as well as its warehouse.[1] Accordingly, four warehouse employees arrived on Hudgens' property intending to picket at the entrances to Butler's retail outlet located in the center's mall. After a conversation with Hudgens' agent, the pickets left the center and filed unfair labor practice charges with the Labor Board.

As is apparent, while the Union was attempting to picket Butler's retail facility on the center's private property, the labor dispute did not originate on this property since it did not concern the manner in which Butler was operating its retail outlet at the center. Rather, the dispute originated at the Butler warehouse, concerned only those operations, and did not concern the labor relations of any Butler retail facility. Consequently, neither the center's owner nor any of his tenants could forestall or curtail this picketing, once it began, by altering their operational methods. Therefore, it may be said that the purpose of the intended picketing was but indirectly related to the business of the center. This Court has recognized the existence of such an indirect relationship in *Lloyd Corp.* v. *Tanner,* 407 U.S. at 564 (1972).

The specific issue is whether Hudgens violated the Labor Act (Sections 7 and 8(a)(1)) by forestalling this picketing. A

1. The Union picketed eight of Butler's retail locations in the Atlanta metropolitan area in an effort to reach the buying public of greater Atlanta, and intended to picket Butler retail operation on Hudgens center.

broader and more significant issue as yet not examined by this Court concerns the accommodation to be made between property and expressive rights when the purpose of expressive activity is but indirectly related to the business of the private property involved. That is, in such a situation, when must property rights yield and permit expressive activity to occur on private property.

B. The Chamber Contends That Expressive Activity Indirectly Related to Private Property's Business Should Be Allowed on This Property Only Upon Compelling Demonstration That Alternative Public Forums Are Absent.

1. A Test Derived from Logan and Lloyd Supports This Contention.

While this Court has not as yet examined the significant and recurring broad issue in this case, it has reviewed related issues in *Logan*[2] and *Lloyd*. A consideration of these decisions is necessary in order to ascertain the circumstances that require property rights to yield to expressive rights. While a determination of these circumstances will not resolve the broad issue here, this determination is necessary to point the way to the answer. In *Logan* this Court found a direct relationship between the purpose of the protest activity and the business of the shopping center because the pickeing was in regard to the manner in which a facility was being operated—that is, without a union —on the center's property where the picketing occurred.[3] This Court then considered the balance to be struck between property and expressive rights when such a direct relationship is found to exist. In *Lloyd,* by contrast, the propaganda activity conducted in the private shopping center was wholly unrelated to any purpose for which this property was being used. (407 U.S. at 564.) That is, the purpose of the expressive or protest activity

2. *Amalgamated Food Employees' Union, Local 590* v. *Logan Valley Plaza, Inc.,* 390 U.S. 308 (1968).

3. 391 U.S. at 320 footnote 9, and at 326. *Lloyd* reaffirmed this view. 407 U.S. at pages 552, 553, 560-561.

in *Lloyd*—an anti-war protest—did not concern the manner in which any tenant of the center operated his business on the center's property or elsewhere. Consequently, this Court prohibited the exercise of this expressive activity on Lloyd's private center. This Court apparently recognized that while the picketed employer in *Logan* could in some measure forestall or curtail the picketing by altering his operational methods at the center, neither the center owner nor his tenants in *Lloyd* had control over the duration or extent of the protest; changing their business methods at any location where they operated would have no impact upon the anti-war protest.

While the instant case has factual parallels with *Lloyd*, rather than with *Logan*, it presents a situation different from each of these prior cases.[4] Thus, the dispute here, like that in *Lloyd*, concerned efforts to proselytize the public and did not originate on the center's private property or concern the manner in which any employer was operating on this property. This Court in *Lloyd* recognized the public could be reached by the use of mass media or public property and there was no need to intrude upon private property. Similarly, here where the buying public is the target of the Union's protest, mass media can effectively be employed. The retailers use this media to attract customers and it may effectively be used to discourage patronage. There is no need to picket on private property here any more than there was in *Lloyd*. However, the controversy here—unlike that in *Lloyd*—was concerned with the operations elsewhere of a center's tenant. Thus, while *Logan* and *Lloyd* represent points of departure, this Court has as yet formulated no rule to accommodate the rights of

4. The Chamber believes that in its *Lloyd* decision, this Court addressed itself to the type of variables present in the instant cause. While *Lloyd* is a Fourteenth Amendment case, it therefore applies by analogy to the instant labor dispute. On the other hand, the analysis in a second line of cases dealing with communication and property rights and typified by *N.L.R.B.* v. *Babcock and Wilcox Co.* (351 U.S. 105 (1956)) and *N.L.R.B.* v. *Central Hardware Co.* (407 U.S. 539 (1972)) applies expressly to organization campaigns *only*. While these cases provide guidance in framing a rule to be applied in this cause, their principles are not strictly applicable to the facts herein.

property and expression when the purpose of the expressive activity is indirectly related to the business of the property. The instant case affords this Court with the opportunity to enunciate such a rule.

The formulation of such a rule begins with an examination of a test that is derived by blending *Logan* and *Lloyd*: private property becomes subject to protext or propaganda activity only when both of the following are satisfied: (a) the purpose of the propaganda or expressive activity is at least indirectly related to the business of the property, *and* (b) there exists no reasonably effective alternative means of communication to reach the intended audience.[5]

This test is stated in the conjunctive. Consequently, there is no need to reach (b)—the question of whether alternatives to private property exist—unless there is first a showing that the purpose of the protest is at least indirectly related to the use to which the property is put.[6]

5. The court below realized the validity of this test or rule. See Part IV in the decision below. That court misapplied this rule by failing to distinguish between directly and indirectly related protest activity.

6. This Court distinguished *Lloyd* from *Logan* by finding in *Lloyd* that adequate means existed to communicate with the public from nonprivate property. However, a fair reading of *Lloyd* requires the conclusion that where the First Amendment activity is *not* related to the use of the private property, this *fact alone* permits the denial of access to private property, including, e.g., shopping centers, and free standing stores and adjacent parking lots. The majority, in distinguishing *Logan*, stated that that case extended *Marsh* to a shopping center situation where the First Amendment activity "was related to the shopping center activities." This Court in *Lloyd* continued that it was not called upon in *Logan* to "consider whether respondents' property rights could, consistent with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center was put." (407 U.S. at 560.) That open question was answered in *Lloyd* where First Amendment activity was barred because it lacked such a relationship to the purpose of the property sought to be used. Moreover, the *Lloyd* dissent concluded that the majority viewed the case as presenting the issue of whether the owner of a shopping center could bar First Amendment activity which was not related to the purpose or use of the center. 407 U.S. at 577-578. In addition, the Oregon Supreme Court in

To state this test, however, does not answer the broad issue posed by this case. Accordingly, the Chamber contends that once a relationship between protest activity and the property's use is found, resolution of this issue requires an examination of the quantum and type of proof required on the issue of alternative avenues of communication. The Chamber further contends that when considering the proof required on the issue of alternative forums, it is necessary to distinguish between situations where the protest activity is directly related to the property's purpose and those where there exists but an indirect relationship.[7] To this end, this Court should now consider the question left open by *Lloyd* and *Logan:* to what extent must persons who desire to propagandize on private property first demonstrate that alternative avenues of communication do not exist when the purpose of their protest is *indirectly* related to the business of the property. The Chamber believes that the proof of the absence of alternative forums in this indirect relation situation must be greater than that required where the expressive activity is directly related to the business of the property.

Lenrich Associates v. *Heyda,* 504 P. 2d 112 (1972) interpreted *Lloyd* as holding that when First Amendment activity is not related to the use of private property catering to the public, the property owner may deny access to his property to those who would assert these First Amendment rights. While the *Lloyd* court did not overrule *Marsh,* 326 U.S. 501 (1946) where the speech activity was unrelated to the use of the property, this failure to overrule *Marsh* undoubtedly reflected a view that in the exceptional circumstances of a company-owned town, the "related" test need not be applied strictly. The court in *Lloyd* held that *Marsh* was not intended to apply to shopping center situations. 407 U.S. at 562. In all situations other than the "very special situation of a company-owned town," the *Lloyd-Logan* analysis applies when dealing with speech activity whether this activity is related to or unrelated to the use of the property.

7. As stated, the court below failed to consider this necessary distinction. The arguments advanced herein apply whether the property is devoted to retail or nonretail use.

2. Decisions in Related Areas, Including Those Precedents Involving Organizational Activity, Also Require the Adoption of the Chamber's Position.

In order to determine the breadth of property rights in this case and to demonstrate the validity of the Chamber's position, judicial precedents in related areas while not determinative should be consulted for their ability to provide guidance. Thus, while employees may have an abstract right to picket their employer wherever he is located,[8] an employer's constitutionally protected property rights are equally valid and deserving of this Court's consideration.[9]

In addition, the rationale of this Court's organizational campaign decisions, *Babcock* and *Central Hardware,* provides guidance in resolving the issue here since it demonstrates this Court's concern for property rights, though these cases do

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8. See *N.L.R.B.* v. *Local 810 Sheet Metals, etc.,* 460 F. 2d 1 (CA 2, 1962); *Local 761 Electrical Workers* v. *N.L.R.B.,* 366 U.S. 667, 672 (1961).

9. The majority's decision in *Lloyd* clearly confers constitutional status to private property rights and undertakes to weigh these rights against the First Amendment rights of parties seeking to use private property as a forum:

> "* * * The Due Process Clauses of the Fifth and Fourteenth Amendments are also relevant to this case. They provide that 'no person shall . . . be deprived of life, liberty, or property, without due process of law.' There is the further proscription in the Fifth Amendment against the taking of 'private property . . . for public use, without just compensation.' "
>
> "We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assure due protection of both, are not easy. But on the facts presented in this case, the answer is clear." 407 U.S. at 567; 570.

It is undisputed that shopping centers, while open to the business public, retain their character as private property. Thus, this Court in *Lloyd* acknowledged that while a shopping center is open to the public

not isolate the variables present here.[10] Thus, the instant matter concerns consumer picketing rights where the dispute, as demonstrated, is not directly related to the business of the property involved. By contrast, *Babcock* and *Central* were explicitly limited to organizational rights. Organizational campaigns involve efforts by a union to utilize private property to unionize employees working on that property. The labor disputes in these cases originate and are centered at the site of the union's propaganda activity. These disputes are directly related to the site's use because they concern the nonunion method by which an employer is operating on that site. Thus, in organizational cases, an employer, unlike Hudgens here, has an ability to curtail the expressive activity by acceding to the union's demands.

Furthermore, during unionization campaigns, this Court in *Babcock* and *Central* has granted employees rights superior to those given to nonemployees. Thus, under *Babcock* and *Central* in order to vouchsafe the explicit statutory right of employees to organize themselves into unions, this Court has permitted employees, as opposed to strangers, to solicit for union membership on their employer's property regardless of the availability of alternative public forums.[11] This Court has recognized that when

for business purposes, it does not lose its private character "merely because the public is invited to use it for designated purposes . . . [t]he essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center." 407 U.S. at 569. The *Lloyd* court also stated that privately owned streets and walks in a shopping center are not the equivalent of municipally owned streets for speech activity purposes. 407 U.S. 565.

The property rights at stake here are not only the right to be free from trespass but also the right to do business without interference from those who would use private property to protest or propagandize.

10. *N.L.R.B.* v. *Babcock and Wilcox Co.*, 351 U.S. 105 (1956); *N.L.R.B.* v. *Central Hardware Co.*, 407 U.S. 539 (1972).

11. The guaranteed right of self-organization coupled with the recognition that the employer's property is the place uniquely appropriate for *employees* to freely associate with other employees form a logical basis to accord employees the right to solicit other employees on their employer's property during organizational campaigns; the communication among employees is a threshold concern during an organizing campaign and vital to that campaign's success.

employees are on their employer's property in connection with their job duties, private property rights are not at stake. Therefore, the rights to be accommodated include only the right of organization and the employer's right to insure discipline, safety and production, with the former right generally prevailing.[12]

However, even in the organizational context this Court has not abandoned concern for property rights. Rather, this Court has decreed that unlike employees, nonemployee union organizers who come onto private property to solicit for union membership or to advertise the advantages of a union can justify their presence there only if they can demonstrate that this presence has a cogent relationship to the employees' exercise of the guaranteed right to organize. A nonemployee seeking to use private property to organize employees has the *burden of proving* that his audience cannot be reached elsewhere through the use of reasonable efforts. See, *Central Hardware Company* v. *N.L.R.B.*, 468 F. 2d 252 (CA 8, 1972) on remand from the Supreme Court. *Babcock* at page 112.[13]

Thus, while the Labor Act has assumed that no public forum constitutes a reasonable alternative to the employer's property for *employees* to attempt to unionize other *employees*, in no other situation is this assumption made. In other situations where non-

12. *Republic Aviation Co.* v. *N.L.R.B.*, 327 U.S. 793 (1945); *N.L.R.B.* v. *Seamprufe Inc.*, 222 F. 2d 860 (CA 10, 1955).

13. Furthermore, it has been held that employees while off duty enjoy only the access rights to private property that are granted to strangers. *GTE Lenkurt, Inc.*, 204 NLRB No. 74 (1973); *N.L.R.B.* v. *Great Atlantic & Pacific Tea Co.*, 277 F. 2d 759 (CA 5, 1960); *Diamond Shamrock Co.* v. *N.L.R.B.*, 443 F. 2d 52 (CA 3, 1971). These holdings demonstrate that the interests to be balanced differ, depending upon whether on or off duty employees are involved. Thus, while the presence of on duty employees on their employer's property does not bring private property rights into focus, when off duty employees seek admission to private property for the sole purpose of soliciting union support, property rights are directly put in issue, just as these rights are at issue when nonemployees seek admission for a similar purpose. Thus, it is logical that both off duty employees and nonemployees should be considered invitees to the same extent and entitled to identical admission rights to private property when they seek to employ this property for the purpose of unionizing.

employees or off-duty employees desire to organize employees, it is instead presumed that reasonable and effective alternatives to private property do exist and may be used to convey messages.[14] Following the guidance of *Babcock* and *Central,* it is evident that the Court has acknowledged that the long standing and constitutionally protected rights of private property should not lightly give way even to organizational activity (*Central* at 544-6) directly related to the use of the property. It follows that property rights should be more stringently guarded in situations such as the instant case when the purpose of the expressive activity is but indirectly related to the use of the property. That is, since the users of the private property to be subjected to protest activity *not directly* related to the property's purpose have no control over the duration or scope of this activity (except by excluding the protesters) there should be no occasion to open this property to such activity absent a conclusive demonstration of a compeling need due to the lack of alternative public forums.

An analysis of the record below utilizing the criteria here proposed compels the conclusion that the strikers have not succeeded in meeting their burden to demonstrate the unavailability of effective alternative public forums and were properly excluded from Hudgens' center.[15] These strikers sought to reach with their message the large segment of the public who at sometime would purchase the products which were sold by Butler and his competitors. This conclusion is buttressed by the breadth and purpose of the picketing itself. The strikers picketed (or

14. In nonorganizational situations such as the instant case this presumption is made where employees or nonemployees desire to engage in expressive activity that is at least indirectly related to the property's business purpose. (*Logan-Lloyd* test, *supra.*)

15. As stated, the Chamber believes that the standard here proposed reflects the variables present in the instant case. However, the Chamber also contends that even under what it believes to be the more lenient *Babcock* principles, Hudgens properly excluded the strikers from its private property since pursuant to *Babcock's* directives they did not satisfactorily demonstrate the absence of alternative public forums.

attempted to picket) each of their employer's ten locations including all of his retail outlets in the metropolitan Atlanta area. Their evident intent was to persuade the public, who at some occasion would require shoes and related products, to purchase these products from others, rather than from their employer and so bring economic pressure to bear upon their employer; he would then be forced to yield to their union's bargaining position.

Once it is accepted that the purchasing public was the target of the pickets, alternatives to the center's private property become readily apparent. Some of these alternatives include newspapers, radio and television.[16] These media are utilized to encourage patronage at the Hudgen's center and could as effectively be employed to discourage patronage. Indeed, the record reveals that the use of such media would be less expensive than the cost of maintaining pickets at Butler's nine retail outlets. The record also discloses that the time spent picketing could have been more effectively utilized by advertising on mass media.

3. The Court Below Failed to Accept the Chamber's Position Due to Its Erroneous Belief That Alternatives to Direct Picketing Are Ineffective.

While the court below expressed the fear that retail chains could locate retail outlets in shopping centers and prevent direct *picket* contract with customers at all stores except that where the dispute originated, this fear is justified only if the assumption is first made that there are no effective alternatives to picketing to

16. In the 1974 strike conducted by the Amalgamated Clothing Workers of America against Farat Manufacturing Company, the union in a nationwide campaign, discussed *infra,* spent huge amounts of money on mass media advertising in an effort to encourage the general public to cease buying Farat products sold by retailers.

As an indication of other means which unions have successfully employed in analogous situations, with only slight exercise of diligence and ingenuity, we refer this Court to a study made in 1967 of the activities of the Retail Clerks Union, as revealed in editions of

communicate with the consumer public. Such an assumption should not lightly be made. As stated, the record below indicates that use of mass media would be less expensive than and as effective as picketing each retail outlet since the union's targeted audience was the general purchasing public.

In addition, the Chamber urges that this Court again take cognizance of the intimidatory effect of picketing. This Court has recognized that picketing, unlike other modes of persuasion, has the propensity to implicate the public and to persuade it to refrain from entering into advantageous relations with the business establishments that are involved in the dispute. In the words of the Court,

> "But while picketing is a mode of communication it is inseparably something more and different. Industrial picketing 'is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.' Mr. Justice Douglas, joined by Black and Murphy, JJ, concurring in *Bakery & Pastry Drivers & Helpers Local* v. *Wohl*, 315 U.S. 769, 775, 776. Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The

its magazine, "The Retail Clerk's Advocate." Not all such devices or alternatives would be appropriate in this or any case, but they reveal what can be achieved by a union which is willing to accept its duty. These alternatives included, for example, a consumer boycott involving the use of balloons and bumper stickers (June, 1967, page 3); announcements on national television (July, 1967, page 18), at state and county fairs, holiday celebrations and other festivals (October, 1967, page 12); extensive distribution of shopping bags with imprinted messages which recipients would tend to retain more than handbills (June, 1967, page 5 and October, 1967, page 12); outdoor billboards (July, 1967, page 14); sponsorship of local radio and television programs (October, 1967, page 12 and April, 1967, page 16); sponsorship of local sports teams (October, 1967, page 28); union industry exhibits (July, 1967, page 14); and a caravan of automobiles with signs inviting spectators' attention (January, 1967, page 28).

> loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word." *Hughes* v. *Superior Court*, 339 U.S. 460, at 464-5 (1950).[17]

It is evident that private property rights must be shielded from picketing especially when, as here, the picketing has no direct relationship with the business of the shopping center. If a lesser standard than that suggested by the Chamber is employed to balance property and picketing rights, private property will become a battleground for pickets to utilize to espouse their many campaigns which are not directly related to the property's business, with scant regard for the availability of alternative public forums or other effective communication techniques. As an example of the intimidatory effect of picketing, recently the Amalgamated Clothing Workers of America, AFL-CIO, and other labor organizations engaged in a nationwide outburst of picketing on private property devoted to retail selling in support of a strike against one nonretail establishment, Farah Manufacturing Co. Farah manufactured clothing sold at the picketed retail establishments. While the picketing arguably was in compliance with this Court's *Tree Fruits* doctrine (337 U.S. 58, 1964), the union's clear and admitted secondary objective was to compel the neutral retailers selling merchandise manufactured by Farah to cease doing business with that company with whom the union had its primary dispute. To this end, the union invaded private retail property and there picketed to promote their dispute with Farah. The target of the union was the nation's consuming public. The labor dispute did not originate on the retail property picketed and did not concern the labor relations of any facility on that property. Had the standards suggested here by the Chamber been then adopted, in many, if not all, instances the pickets would have been compelled to utilize alternative avenues of communication since it is patent that they could not

17. See, in addition, Teller, *Picketing and Free Speech*, 56 Harv. L. Rev. 180, 200-02 (1942); Dodd, *Picketing and Free Speech: A Dissent*, 56 Harv. L. Rev. 513, 517 (1943).

demonstrate that direct picketing on private property was their only effective means to reach their large intended audience.

Here, then, and in Farah the deleterious effect to private property caused by consumer picketing far outweighs the necessity to utilize this property for this protest activity. Accordingly, this Court should require strict and compelling proof by the unions that alternative forums are unavailable before requiring private property to open to consumer picketing, particularly where the underlying labor dispute did not originate on this property.

The test suggested here by the Chamber balances the competing rights of property and communication giving due regard to each; the Chamber urges that this test be adopted by this Court to apply to situations where the protest activity is not directly related to business purpose of the private property.

CONCLUSION.

For the foregoing reasons the Chamber urges that this Court grant review.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

SCOTT HUDGENS, PETITIONER

v.

NATIONAL LABOR IRELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (A. 1-15)[1] is reported at 501 F.2d 161. The Board's supplemental decision and order (A. 17-20) are reported at 205 NLRB No. 104. The Board's original decision and order (A. 33-40) are reported at 192 NLRB 671.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1974 (A. 16). The petition for a writ of certiorari was filed on December 21, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "A." references are to the petitioner's appendix. "J.A." references are to the joint appendix filed in the court of appeals.

QUESTION PRESENTED

Whether the Board reached a proper accommodation between property rights and employee rights by concluding that in the circumstances of this case the owner of a large shopping center violated the National Labor Relations Act by prohibiting warehouse employees, who are engaged in a lawful strike against their employer, from seeking support for that strike by picketing the entrances to a retail store in that center leased by the employer.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at pp. 2-3 of the petition. The following portion of the Act is also relevant:

> Section 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

STATEMENT

Petitioner Hudgens owns and operates the North DeKalb Shopping Center in DeKalb County, Georgia (J.A. 10, 49-50).[2] The shopping center, which covers approximately 55 acres of land, consists of a large central structure housing 60 stores and a parking lot surrounding it that can accommodate 2,640 automobiles (J.A. 10, 50-51, 89, 154). There are four customer entrances from the parking lot into the shopping center building, through which 85 to 90 percent of all customers enter (J.A. 43, 50-51, 155). Several of the stores have entrances fronting on the parking

[2]It is undisputed that Hudgens is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act (J.A. 43, 49-50, 79, 81-82).

lot but most of the stores are accessible only from aisles, which are 30 to 40 feet wide and intersect, forming an extensive enclosed mall within the shopping center building (J.A. 43-44, 50-51, 89, 158). The mall contains planters, benches, fountains, pools, restrooms, and drinking fountains (J.A. 164-165). In addition, it contains a "charity booth" and an auditorium available for the use of approved groups (J.A. 101-102, 157, 167, 173-177, 179). The stores are leased from Hudgens, the lease granting the "lessee, its employees, agents, customers and invitees the non-exclusive right to use the parking and other common areas" in the shopping center (J.A. 92-93).

The shopping center property is located on the corner where the Lawrenceville Highway, a four-lane road, and North Druid Hills Road intersect (J.A. 43, 55). There are five entrances leading into the parking lot from these roads (J.A. 43, 51, 155, 189-190). The shopping center building is approximately 500 feet from these entrances (J.A. 10, 143, 151). About 45,000 people from the greater Atlanta area visit the mall each week (J.A. 15, 191).

The warehouse employees of Butler Shoe Company ("Butler") are represented by Local 135, Retail, Wholesale and Department Store Union, AFL-CIO (the "Union") (J.A. 12, 43-44, 129, 140). In January 1971, the warehouse employees went on strike for a new contract (J.A. 12, 44, 129, 132, 134). In order to gain support for their contract demands, the warehouse employees decided to picket not only Butler's warehouse, but also all of its retail stores in the Atlanta area, including the store in the enclosed mall at the North DeKalb Shopping Center (J.A. 12, 44, 129-130, 134, 146).

Accordingly, on the morning of January 22, 1971, four warehouse employees entered the enclosed mall[3] with placards reading, "Butler Shoe Warehouse on Strike, AFL-CIO, Local 315" (J.A. 44, 51, 150). Before the Butler store opened, the four employees sat on a bench near an entrance to the store (J.A. 44, 51, 150). Douglas Ballard, the general manager of Hudgens' shopping center,[4] noticed the seated employees and told them that they could not picket in the mall or in the parking lot because these areas were private property (J.A. 44, 51, 130, 142, 150). Ballard also told the employees that they would have to picket on the Lawrenceville Highway or on North Druid Hills Road and that, if they did not leave, they would be arrested (J.A. 13, 57-58, 59, 131, 150). The employees left the mall but returned a short time later and began picketing in the immediate area of the mall adjacent to Butler's store (J.A. 44, 51, 54, 150). The store, which is located where two aisles of the mall intersect, has display windows and an entrance on each of these aisles (J.A. 54, 137, 159). Two pickets walked in parallel lines in each aisle, close to the side of the store (J.A. 54, 137-138).

The picketing was peaceful and continued for about 30 minutes (J.A. 44, 51, 150). At approximately 11:30 a.m., Ballard telephoned the shopping center and had one of the employee-pickets called to a nearby phone (J.A. 44, 51, 57). Ballard warned that, if the picketing did not stop in thirty minutes, he would have the police at the center to lock up the pickets (J.A. 10, 44, 57-58). Shortly thereafter, Hudgens' attorney told the Union's attorney that picketing was not permitted within the enclosed mall and that, if the pickets did not leave, Hudgens would telephone the

[3]The Butler store can be entered only from the enclosed mall (J.A. 44).

[4]Concededly, Ballard was acting as Hudgens' agent (J.A. 50).

DeKalb County Police Department and obtain arrest warrants for criminal trespass (J.A. 44, 52). The pickets then left the premises and did not return (J.A. 44, 143).

On these facts, the Board held that Hudgens violated Section 8(a)(1) of the Act by threatening to cause the arrest of Butler's picketing employees, and entered an order requiring it to cease and desist from such conduct in the future (A. 18, 39-40). The Board found that the employees were engaged in "activity coming directly within the ambit of Section 7, viz. an economic strike engaged in by employees against their own employer" (A. 18). The Board concluded that "their employer, whose store happens to be located within [Hudgens'] shopping mall, was not insulated from the picketing merely because someone else, [Hudgens], was the technical owner of the shopping mall and the land surrounding it" (A. 19). The Board stated (*ibid.*):

> [Hudgens'] property rights in the mall were not limited to its exclusive use. Indeed, to limit the mall to that use would have defeated its purpose and that of [Hudgens'] tenants whose businesses were open to the public, as well as their employees. Clearly, it was [Hudgens'] intent to permit use of the shopping mall to these classes of persons, and that thus Butler's employees were within the acceptable groups. That being the case, Butler's employees could not be designated as unacceptable and excluded from the mall solely because they chose to engage in protected concerted activity.[5]

[5]The Board added (A. 19):

> [W]e are of the view that our interpretation achieves a desirable accommodation between [Hudgens'] property rights and the employees' Section 7 rights by according employees the right to picket their employer at such a proximate location, directly in front of the employer's premises, rather than requiring them to picket at a more distant location which may well be a common situs for entrance to other places of business and thus invite secondary effects.

Upon review, the court of appeals enforced the Board's order (A. 1-15). The court concluded that this Court's decision in *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, "although having its genesis in the constitutional issues" there raised, "isolates the factors relevant to determining when private property rights of a shopping center owner should be required to yield to the section 7 rights of labor picketers" (A. 10). Applying those factors here, the court held that the Section 7 rights of the picketing employees were entitled to prevail since the picketing was related to the normal functions of the shopping center and alternatives to the picketing were either unavailable or inadequate (A. 10-15).

ARGUMENT

The decision of the court of appeals is correct and there is no conflict of decisions. Accordingly, further review is not warranted.

1. Section 7 of the Act guarantees that employees may "engage in * * * concerted activities for the purpose of collective bargaining * * *," and Section 8(a)(1) prohibits employer interference with that right. Peaceful picketing by employees of their employer in support of lawful bargaining demands has long been recognized as a form of protected concerted activity. *United Steelworkers* v. *National Labor Relations Board (Carrier Corp.)*, 376 U.S. 492, 498-499; *International Longshoremen's Ass'n, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, 200-201; *National Labor Relations Board* v. *United States Cold Storage Corp.*, 203 F.2d 924, 927 (C.A. 5), certiorari denied, 346 U.S. 818. However, when Section 7 rights conflict with an employer's property rights, it is necessary to balance the competing legitimate interests. See *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793; *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105; *Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539. The Board's decision, sustained by the court of appeals, reflects a reasonable accommodation of these competing interests in the circumstances of this case.

Thus, the shopping center here has all the attributes of a business district devoted to public use. It is a large tract, containing 60 retail stores, which Hudgens has opened to customers of the stores (who are drawn from the entire metropolitan Atlanta area), to employees of the stores, and to deliverymen. The warehouse employees of Butler, a lessee of one of the stores, in furtherance of a legitimate contract dispute with Butler, engaged in peaceful picketing immediately outside the mall entrances to their employer's store in the center. As the court of appeals correctly noted, "[t]he picketers' message to withhold patronage from the Butler store was directly related to Hudgens' invitation, although not specifically related to the operation of the particular Butler store" in the mall (A. 11). Moreover, alternative locations for picketing the Butler store were not acceptable, since they would present traffic hazards, obscure the pickets' message, and make it difficult to limit the effect of the picketing to the primary employer (A. 15). See *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 321-322, 323. In these circumstances, to prohibit the picketing at the Butler store would substantially dilute the right which employees have traditionally enjoyed to picket their employer wherever he is located,[6] while, at the same time, it would vindicate little more than Hudgens' naked title interest in

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[6]See *Local 761, Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667, 672; *National Labor Relations Board* v. *Local 810, Steel, Metals, etc., Bros. of Team., etc.*, 460 F.2d 1 (C.A. 2).

the center. Indeed, such prohibition would, as the court of appeals noted (A. 11), immunize employers in shopping centers from " 'criticism (in many circumstances) by creating a *cordon sanitaire* * * * around their stores' " (quoting *Logan Valley, supra,* 391 U.S. at 325, cited with approval in *Lloyd, supra,* 407 U.S. at 562).

2. Contrary to petitioner's contention (Pet. 4-6), the decision below is not contrary to *Babcock & Wilcox* and *Central Hardware, supra.* In those cases, the Court held that, with respect to organizational activity by nonemployees on essentially private property, a proper accommodation between employee Section 7 organizational rights and the employer's property rights requires the latter to yield only when reasonable attempts by nonemployees to communicate with the employees through other available channels of communication are ineffective.[7] The present case, by contrast, involves peaceful picketing by employees in furtherance of a lawful strike against their employer, and it takes place in a large commercial shopping center, which has acquired many of the characteristics of the normal municipal "business block." A different accommodation between Section 7 rights and property rights is appropriate, we submit, in this situation.[8] Not only has the owner further diminished his property rights by opening the premises more widely to the public, but peaceful picketing in furtherance of a lawful strike, which enjoys a special

[7]Thus, in *Central Hardware, supra,* 407 U.S. at 544-545, the Court emphasized:

> The principle of *Babcock* is limited to this accommodation between organization rights and property rights. This principle requires a "yielding" of property rights only in the context of an organization campaign.

[8]Petitioner errs in contending (Pet. 5) that the Board stated that "the test now to be applied to the case at bar is that set out in *Babcock and Wilcox.*" The quotation is from the decision of the Administrative Law Judge (A. 31), whose rationale was not adopted by the Board (A. 18-19).

status under the Act (see Section 13, *supra,* p. 2),[9] is involved. Moreover, the intended audience of the picketing includes not only the store's employees, but its potential customers, who cannot easily be identified until they approach the store. "This contrasts," as the court of appeals observed (A. 12), "with organizational campaigns in which the audience solicited is composed of employees of a particular employer, a limited usually identifiable group, which often can be reached very effectively by means other than personal contact on the employer's private property."

In the situation here, it was proper, in making the accommodation between Section 7 rights and property rights for the Board and the court to look to the factors which the Court deemed relevant in *Logan Valley* and *Lloyd, supra*—*i.e.*, whether the activity is directly related to the use to which the shopping center is being put, and whether other reasonable opportunities for conveying the message to the intended audience are available.[10] Those cases, like the present case, involved consumer appeals at a large, privately owned shopping center, which was the equivalent of a municipal "business block." In *Logan Valley*, a union,

[9]See also *National Labor Relations Board* v. *Drivers, Local Union No. 639,* 362 U.S. 274, 281-282.

[10]To be sure, the Court, in *Central Hardware, supra,* concluded that the Board had erred in relying on *Logan Valley* because that decision "rests on constitutional grounds; it is not a §7 case" (407 U.S. at 545). However, it does not follow, as petitioner contends (Pet. 5), that the Court thereby intended to preclude the Board, in defining the scope of Section 7 rights under the National Labor Relations Act, from utilizing the *Logan Valley* factors in other factual settings where they would be appropriate.

seeking to organize the employees of one of the stores in the center, attempted, by picketing in front of the store, to induce customers not to patronize it; in *Lloyd,* a group protesting the Viet Nam War, sought, by handing out leaflets in the center, to obtain public support for their cause. The Court upheld a right of access in *Logan Valley,* but denied it in *Lloyd.* The difference between the two results, the Court explained in *Lloyd* (407 U.S. at 563-564), is that, in the former case, the picketing was " 'directly related in its purpose to the use to which the shopping center property was being put' " and "no other reasonable opportunities for the pickets to convey their message to their audience were available"; in the latter case, neither of these elements was present. As shown (*supra,* p. 3), here, as in *Logan Valley,* the picketing was directly related to the use of the shopping center and no other reasonable opportunities for reaching the pickets' audience were available.[11]

3. The decision below does not conflict with *National Labor Relations Board* v. *Visceglia, t/a Peddie Buildings,* 498 F.2d 43 (C.A. 3) (Pet. 6-7). As the court below correctly concluded (A. 15, n. 14), that case is "clearly distinguishable." *Peddie* involved picketing at an industrial park,

[11]There is no merit to petitioner's contention (Pet. 7-8) that, since the labor dispute did not involve Butler's mall store, the activity here was only indirectly related to the purpose of the mall. As the court below properly concluded (A. 11), under *Logan Valley* and *Lloyd,* "[t]he appropriate focus is on the message sought to be conveyed and its intended audience, not * * * on whether the labor dispute in fact was precipitated by something involving the operation of one particular store in the shopping center." Since "[p]otential customers of Butler's North DeKalb store comprised a group within the scope of the broad invitation issued by Hudgens to the public to come and shop at center stores," the "picketers' message to withhold patronage from the Butler store was directly related to Hudgens' invitation" (*ibid.*).

which was less open to the public than was the shopping center here (see 498 F.2d at 45-46). Moreover, the court in *Peddie* found that there was "no evidence" that the pickets could not have effectively communicated their "message to the appropriate people" at the entrance to the park (*id.* at 49).[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

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FEBRUARY 1975.

[12]Indeed, the court in *Peddie* specifically stated that "we do not believe that the instant record requires us to reach [the] difficult problem" of "whether *Logan Valley* applies to pickets (labor or otherwise) in industrial parks" (498 F.2d at 45, n. 3).

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Statute

National Labor Relations Act, as amended, 29 U. S. C. 151, et seq.:

Section 7 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-773

SCOTT HUDGENS, AN INDIVIDUAL,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT, STORE UNION, AFL-CIO,
Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE TO BRIEF IN OPPOSITION

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1. Following its pattern, characterized by the court below as "Changing horses in midstream" (Pet. App., p. A. 6), Board counsel has now, in its brief in opposition, presented still another markedly contradictory justification for the Board's decision in the instant case—an approach that was earlier rejected by the Board itself in its own opinion.

In its initial decision (Pet. App., pp. A. 33-40), the Board conceded that *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza*, 391 U. S. 308 (1968), "establishes the

Union's right to picket at the location it chose . . ."; that Hudgens' private property rights at its enclosed mall shopping center could be dislocated in favor of pickets who had no working relationship with the Center simply because the Center property was "generally open to public access during normal business hours" (Pet. App., pp. A. 37-38). However, after obtaining a remand from the Court of Appeals to reconsider that view in light of this Court's decision in *Central Hardware* v. *N. L. R. B.*, 407 U. S. 539 (1972), the Board recognized that "the test of lawful union activity . . . is not that enunciated in *Logan Valley* . . . [c]learly the test now to be applied to the case at bar is that set out in [*N. L. R. B.* v.] *Babcock and Wilcox* [*Co.*, 351 U. S. 105 (1956)]" (Pet. App., pp. A. 23, A. 31).[1] Upon review of that supplemental decision in the court below, the Board shifted ground again and asserted a third position, i.e., that "this case is controlled by *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793 (1945)" (Pet. App., p. A. 6). And now, in opposition, the Board has returned full circle to its own previously-reversed initial decision. It contends that since the Center "has all the attributes of a business district devoted to public use" and "has acquired many of the characteristics of the normal municipal 'business block'" (Opp., pp. 7-8), *Logan Valley* is controlling. This argument, apart from constituting impermissible *post-hoc* rationalizations of appellate counsel (see *Metropolitan Life Insurance Co.* v. *N. L. R. B.*, 380 U. S. 438 (1965)), is a return to the practice of adjudicating Labor Act cases by constitutional principles and therefore flies

1. The Board asserts (Opp., p. 8, n. 8) that the above quotes from the Board's Administrative Law Judge's opinion are not attributable to the Board itself which, it is asserted, did not rely on the Law Judge's "rationale." This is clearly specious. The Board both adopted the Law Judge's recommendation and expressly relied upon *Visceglia, t/a Peddie Buildings*, 203 NLRB No. 27, 83 LRRM 1066 (1973) (Pet. App., p. A. 18). And, in *Peddie*, the Board stated that "For the reasons expressed by the Supreme Court in *Central Hardware, supra*, we find the principles of *Babcock and Wilcox*, rather than those of *Logan Valley*, to be applicable to the present case." 83 LRRM at 1068.

in the face of this Court's contrary admonition in *Central Hardware*, 407 U. S. at 545.[2]

The return to adjudication of Labor Act questions by the *Logan Valley* constitutional analysis undermines *Central Hardware*, just as the court below's adjudication of the rights of strangers on private property by the *employee* standards of *Republic Aviation* undermines *Babcock and Wilcox*. Review by this Court is, therefore, necessary to provide much needed guidance in this area and to clarify the meaning and interrelationship of *Logan Valley*, *Babcock and Wilcox*, *Central Hardware*, and *Republic Aviation*.

2. Certiorari is further warranted to review the conflict between the decision below and that of the Court of Appeals for the Third Circuit in *N. L. R. B.* v. *Visceglia, t/a Peddie Buildings*, 498 F. 2d 43 (1974). In opposition, the Board attempts to escape this conflict by alleging that *Peddie* is "clearly distinguishable." (Opp. pp. 10-11.) Again, however, the Board contradicts itself, for its supplemental decision's finding of a violation was expressly based on "the reasons specifically set forth in *Frank Visceglia and Vincent Visceglia, t/a Peddie Buildings*" (Pet. App., p. A. 18.) The decision below, therefore, contrary to the Opposition, creates an undesirable lack of uniformity in the administration of the Act, which should be resolved by this Court.

2. The Board asserts (Opp., p. 9, n. 10) that the *Central Hardware* restriction against adjudicating Labor Act cases by *Logan Valley* constitutional precepts was not breached here because this Court assertedly did not intend to "preclude the Board, in defining the scope of Section 7 rights under the National Labor Relations Act, from utilizing the *Logan Valley* factors in the other factual settings where they would be appropriate." That, however, begs the question. A reference to constitutionally relevant criteria was not meant to, as in this case, *totally displace*, nor provide an alternative decision-making base, to the Section 7 analysis imposed by *Babcock*, which turns on whether the Board's General Counsel has carried his burden of establishing that alternative means of communication are unavailable.

petitioner's brief

Supreme Court, U. S.
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BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App., pp. A1-A15)[1] is reported at 501 F. 2d 161 (1974). The supplemental decision and order of the National Labor Relations Board (Pet. App., pp. A17-A20) is reported at 205 NLRB No. 104 (1973). The initial decision and order of the Board (Pet. App., pp. A33-A40) is reported at 192 NLRB 671 (1971).

1. The opinions below are reproduced in the appendix to the petition for a writ of certiorari (hereafter "Pet. App."). Supplemental materials, including portions of the transcript of the hearing before the Administrative Law Judge, as well as exhibits introduced in that proceedings, are reproduced in the separate Appendix (hereafter "App.").

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit (Pet. App., pp. A1-A15), enforcing the supplemental decision of the Board, issued on September 25, 1974. The Court thereafter entered judgment (Pet. App., p. A16) on October 18, 1974, and this Court granted the petition for a writ of certiorari on March 17, 1975. Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U. S. C. § 151, *et seq.* (the "Act"), are set forth below:

* * * * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

* * * * *

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

* * * * *

QUESTIONS PRESENTED

1. Is the relationship between consumer picketing and shopping center property relevant to determining whether pickets have any right under the Act to require that the private property rights of the center owner must yield? If so, was the picketing in the instant case sufficiently related to the business of Petitioner's shopping center, notwithstanding that there was no labor dispute at the Center, to meet this test?

2. Is the test of *N. L. R. B.* v. *Babcock & Wilcox*, 351 U. S. 105 (1956)—that those seeking to exercise rights under the Act may not dislocate private property rights unless there is either discrimination or no alternative means of communication available—also determinative where there is consumer picketing on a private shopping center; or is the *Babcock & Wilcox* standard restricted to only organizational activities? Assuming the *Babcock & Wilcox* rule encompasses consumer picketing, was that test met in the instant case where there were other alternative means of communication to picketing on the interior shopping mall of Petitioner's center?

STATEMENT OF THE CASE

Petitioner's North DeKalb Shopping Center, located in an unincorporated area of Decatur, Georgia, is a modern shopping center[2] in which a substantial investment has been made to provide a comfortable and attractive interior mall area which permits shopping in an atmosphere free of distraction or interference.[3] Because disruptive activities in the mall would be

2. The Center draws its customers from throughout the metropolitan Atlanta, Georgia area. Diagrams showing the layout of the Center, including its enclosed interior shopping mall, appear at App., pp. 50-51.

There are five entrances to the Center, each of which contains a public right-of-way. Two entrances are located just after a stoplight and require a slow turn into the Center. The other three approaches are from lightly travelled, primarily residential streets and require a full stop prior to entry. After traversing the parking lot, and crossing a raised sidewalk, there are then four entrances to the enclosed interior shopping mall. One of the entrances is located only fifty feet from the retail store of the Butler Shoe Company—the particular tenant store involved here—and eighty-five to ninety percent of the customers of that store utilize that entrance (Pet. App., p. A35; App., pp. 11-12, 50, 51, 103-107, 110-111, 144).

3. The shopping mall, which is maintained by Hudgens, is fully enclosed, temperature controlled, and appointed with planters, benches, fountains, and other attractions to encourage customer patronage (App., pp. 115-116). The mall area has also been carefully designed to merge the stores and non-selling areas into a single market area; the stores have an unobstructed footage on, and their displays and merchandise are easily visible from, the thirty to forty foot wide mall common aisleways (App., pp. 41-51, 110, 115-116). Many tenants, such as Butler, also display high impulse items on their leased property in front of the stores (App., pp. 43, 120).

There are also three commercial kiosks (mall sales booths), leased at a high rental rate, actually located in the middle of the mall common aisleways (App., pp. 48-49, 108-109, 113-114, 116-117). Hudgens also maintains a charity kiosk (App., pp. 108-109) whose use is meticulously regulated to preclude any interference with the Center's commercial operations. A permit must first be sought to use the booth and, if the applicant is granted permission, he must display the permit (App., p. 60). Persons occupying the booth without a permit are forced to leave. Only the sale of homemade goods is

adverse to the commercial interests of Hudgens and its tenants,[4] as well as involve added maintenance and security expense to Hudgens (App., pp. 130-131, 154-155), the Center has uniformly and nondiscriminatorily forbidden *all* activity which does not directly relate to Center business (App., pp. 122-126, 129, 130-131, 154-157).[5] This rule is strictly enforced against tenants and strangers alike (App., pp. 122-126, 129, 130-131, 55-57).[6] See *Steffel* v. *Thompson*, 415 U. S. 452 (1974), involving enforcement of the same Center prohibition against nonunion activities.

One of the Center's sixty tenants is the Butler Shoe Company which has nine retail stores in the greater Atlanta, Georgia area. Although no employee of that store was involved in any

permitted, and users are admonished, in accordance with a reminder notice posted inside the booth, that they are forbidden to operate outside the booth or to solicit Center customers from the booth (App., pp. 124-128).

4. Hudgens, in addition to the minimum rent charged tenants, also receives a percentage of their gross sales (App., p. 52).

5. The Center is clearly marked and maintained as private property. The mall area, for example, is locked each night, and during certain days access is also denied to the public. There is a security patrol which regularly protects the Center. There are also dress and pet regulations in the mall area, and parking regulations in the parking lots, promulgated and enforced by Hudgens. (App., pp. 45, 111-112, 150-154).

6. The Center thus receives and regularly denies from fifteen to twenty-five requests a week from various persons and groups who seek to use the Center's premises for purposes unrelated to its business functions (App., pp. 123-125, 154-155). Moreover, as a specific condition of their tenant agreements, Center tenants are obligated not to "encumber or obstruct the sidewalks, malls or common areas", display anything thereon without Hudgens' permission or even maintain any exterior "advertising matter or thing of any kind." This condition is, and has been, strictly enforced (App., pp. 114-115, 120-121, 156-157, 55-59). Even tenants' sound reproductions must not emanate into the mall from the stores (App., pp. 57-58), and all signs which tenants desire to use must first be approved by Hudgens (App., p. 58).

union activity, and there was no labor dispute at the Center,[7] various individuals employed by Butler at its Atlanta warehouse and represented by Respondent Local 315, Retail and Wholesale Department Store Union, sought to engage in consumer picketing [8] at the Center on January 22, 1971, as well as contemporaneously at the other Butler retail stores in metropolitan Atlanta, in furtherance of the Union's contract demands at the warehouse.

Prior to the commencement of picketing and before the Center stores opened, the Center manager noticed four of the potential pickets seated in the mall with picket signs, and asked them to leave. They then left, only to return and commence picketing on the mall's common aisleways adjacent to the Butler store. After picketing for about one-half hour, the Center manager again asked the pickets to leave (App., pp. 12, 98).[9] When they declined this request, he threatened to have the police arrest them for a violation of the Georgia Criminal Trespass Law.[10] The pickets then left the premises and the Union filed

7. The pickets have never worked at the Center, have never sold shoes, did not know any of the Center Butler store employees, and were not supervised by the supervisors of that store (App., pp. 77, 82-83, 88-89, 91-92, 97-99, 148).

8. Four to five pickets walked in parallel lines in front of the store, so that they would occasionally be abreast of each other, with picket signs reading "Butler Warehouse is on Strike, AFL-CIO Local 315" (App., pp. 12, 98).

9. Although there was a conflict in the record as to what Center Manager Ballard told the pickets (see Pet. App., p. A3, n. 4), the Board's Administrative Law Judge discredited Ballard's testimony that he advised the pickets that they were only banned from the interior mall and that they could picket outside the mall at the various entrances thereto (Pet. App., p. A26; App., pp. 17-18, 19, 12-13, 134-135). Notwithstanding this determination, however, it is undisputed that all parties were put on notice (Pet. App., p. A25; App. p. 25) that the proscription upon the Union's picketing pertained *only* to the mall interior and that picketing elsewhere on Hudgens' property was permissible.

10. Title 26, Ga. Code Ann. § 26-1503, which provides:

> (a) A person commits criminal trespass when he . . . knowingly and maliciously interferes with the possession or use of the property of another person without his consent.

(Footnote continued on next page)

the instant charges with the Board alleging a violation of Section 8(a)(1) of the Act (App., p. 3).

In its initial decision (Pet. App., p. A38), the Board sustained the charge, finding that because the Center mall was "generally open to public access" when the picketing occurred, *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968) "establishes the Union's right to picket at the location it chose." (Pet. App., pp. A37-A38). Hudgens then petitioned the Fifth Circuit to review that decision. During the pendency of that appeal, however, after this Court's decisions in *Central Hardware* v. *N. L. R. B.*, 407 U. S. 539 (1972), and *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972), issued, the Board obtained a remand to reconsider its decision and, in turn, remanded the case to an Administrative Law Judge. The Law Judge ruled that the rule of *Babcock & Wilcox* governed, but held that since the Union "had no other reasonable access to Butler's customers coming to the DeKalb shopping center," the test of that case had been met. (Pet. App., p. A31). The Board affirmed, but on a different rationale; that because the Center mall was open to the public, pickets could not be excluded. (Pet. App., p. A19). On Hudgens' petition for review, the Court of Appeals, rejecting the Board's approach but enforcing its order, fashioned its own test. It held that since the picketing was directed at members of the public who might patronize the Butler Shoe store, this fact served to both make the picketing relevant to the property and to render alternative channels of communication, short of picketing in the enclosed mall, "patently inappropriate." (Pet. App., p. A13).

> (b) A person commits criminal trespass when he knowingly and without authority . . . remains upon the land or premises of another person . . . after receiving notice from the owner or rightful occupant to depart.

Hudgens subsequently petitioned the Georgia Courts for a declaration of rights that, under the Georgia Criminal Trespass Law, it had a right to exclude the Union's pickets. The Georgia Court of Appeals, however, held that the matter was preempted and subject to the exclusive jurisdiction of the Board (..... Ga. App. ....., 210 S. E. 2d 821 (1974), *cert. den.* ..... Ga. ..... (1974). Hudgens' petition for a writ of certiorari (No. 74-1032) to review that decision has not yet been ruled upon by this Court.

SUMMARY OF ARGUMENT

1. In *Babcock & Wilcox*, this Court held that Section 7 rights and constitutionally protected property rights must be accommodated by requiring a union to use available alternative means to communicate its message as a prerequisite to appropriating private property. Although this rule was formulated in an organizational case context, both the Board and its administrative judge correctly concluded that the same rationale also governed the consumer picketing at issue in this case.

The Board's appellate counsel, however, in derogation of the Board's decision, inconsistently urged that, instead of *Babcock & Wilcox*, this case is controlled by either the constitutional principles of *Logan Valley* or the employee standards of *Republic Aviation*. Neither of these contentions have merit. The suggestion that *Logan Valley* is determinative flies in the face of this Court's admonition in *Central Hardware* that statutory cases are not subject to adjudication by constitutional criteria. And the argument that the employee standards of *Republic Aviation* apply, and that consideration of alternative channels analysis may therefore be dispensed with altogether, was properly rejected by the court below. *Republic Aviation* only pertains to the protection of employees on their employer's property pursuant to a work relationship, a situation not present in the instant case.

2. The lower court also held that before the Union had any right *at all* to picket on private shopping center property, its picketing must first be found to be related to that center. It applied this relationship requirement so broadly, however, as to be a meaningless requirement. Assuming that a relationship requirement is applicable, there must be a labor dispute at the situs if that test is to have any meaning at all. Where, as

here, the dispute is at a distant situs and does not involve any center employees, the relationship test has not been met.

3. While the Board and Court of Appeals properly concluded that *Babcock & Wilcox* applied, they grossly misapplied the standard of that case. Contrary to their view—that the broad audience which was the subject to the Union's message rendered the use of alternatives to picketing inside the Center's enclosed mall inappropriate—it was precisely that expansive audience that rendered the use of alternatives particularly appropriate. The Union here had, in addition to the right to safely picket at public locations immediately adjacent to the Center, countless effective alternatives to communicate its message to the citizenry of metropolitan Atlanta short of appropriating Hudgens' property. The Union had, therefore, no right under *Babcock & Wilcox* to confiscate Hudgens' private shopping center property for that purpose.

ARGUMENT

I.

THIS CASE IS GOVERNED BY THE TEST OF N. L. R. B. v. BABCOCK & WILCOX.

In *Babcock & Wilcox*, this Court enunciated the applicable standards where there is a conflict between rights under the Act and private property rights: "that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution" 351 U. S. at 112. Both the Administrative Law Judge and the Board in its supplemental decision agreed that this test controlled the disposition of the instant case. Thus, the Law Judge declared, "[c]learly the test now to be applied to the case at bar is that set out in *Babcock and Wilcox*." (Pet. App., p. A31). And the Board similarly held, relying (Pet. App., p. A18) upon the reasoning of its decision in *Peddie Buildings*[11] in which it stated: "For the reason expressed by the Supreme Court in *Central Hardware, supra*, we find the principles of *Babcock and Wilcox*, rather than those of *Logan Valley*, to be applicable to the present case." 83 LRRM at 1068.

Board appellate counsel, however, "[c]hanging horses in midstream" (Pet. App., p. A6), disavowed the *Babcock & Wilcox* test. Before the lower court, he urged that the wholly different standard of *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S.

11. *Frank Visceglia and Vincent Visceglia, t/a Peddie Buildings* 203 NLRB No. 27, 83 LRRM 1066 (1973), *enf. denied, N. L. R. B.* v. *Visceglia, t/a Peddie Buildings*, 498 F. 2d 43 (3rd Cir. 1974).

793 (1945),[12] was dispositive. Then, in his most recent opportunity—in the brief in opposition (pp. 7-9) to the petition for writ of certiorari—Board counsel posited still another position, that as the Board had originally concluded but thereafter repudiated (compare Pet. App., p. A38 with Pet. App., pp. A18, A31), the constitutional principles of *Logan Valley* were the correct criteria. And finally, as already noted, the Court of Appeals, in rejecting the applicability of both *Babcock & Wilcox* and *Republic Aviation*, instead fashioned still another rule: that, in addition to the "consideration of alternatives required by *Babcock and Wilcox*," in consumer picketing situations, unlike organizational cases, "the relationship between the picketing and shopping center operations . . . is relevant to determining whether the pickets have any right *at all* to conduct consumer picketing inside a private enclosed mall . . ." (Pet. App., pp. A9-A10; emphasis added). In applying this additional criterion, however, the court below rejected a "strict relationship requirement"; it held that as long as picketing is directed at potential patrons of a shopping center, even though there is no labor dispute at the situs or relationship between the picketing "and the actual operation of an individual store in the shopping center", the relationship test has been satisfied (Pet. App., p. A12).

The Board, it is submitted, was correct in holding that *Babcock & Wilcox* presents the correct rule for adjusting the conflicting property rights and Section 7 rights involved in this case. Its error, as demonstrated *infra*, was that it failed to properly apply that test. Various preliminary considerations have, however, been interposed by the conflicting positions taken by Board's appellate counsel in derogation of the Board's decision, and by the new test formulated by the lower court. Accordingly, we initially show that *first*, there is no First Amendment question

12. Under the *Republic Aviation* test, employees on their work premises may engage in Section 7 activities without regard to the existence of alternative forums of communication unless it can be shown that a limitation is necessitated by the special circumstances of the case.

presented in this case, and *Logan Valley* is, therefore, inapplicable; *second*, that the employee rule of *Republic Aviation* is also not relevant to this case; and *third*, that the relationship rule formulated by the lower court, if it is to constitute a meaningful additional criterion for consumer picketing cases, cannot be given the broad interpretation accorded by the Court of Appeals.

A. There Is No First Amendment Question Involved in This Case.

The contention that *Logan Valley* is dispositive[13] flies in the face of this Court's admonition in *Central Hardware* against deciding Section 7 cases on constitutional grounds. 407 U. S. at 545. Even the dissenting opinion in *Central Hardware* agreed that, by resolving a Section 7 case "under *Logan Valley*, the agency and lower court decided a difficult constitutional issue that might well have been avoided by deciding the case under the [Act] . . . The principle is well established that decisions on constitutional grounds should not be reached unnecessarily." 407 U. S. at 549 (dissenting opinion). That same principle is equally applicable to this case. The Act, after all, "does not give union members the same comprehensive rights to free expression on the private property of an employer that the First Amendment gives to all citizens on private property that is the functional equivalent of a public district." 407 U. S. at 548 (dissenting opinion). Here, therefore, regardless of whether the pickets may have had a constitutional right to picket on the Center mall,[14] this case must be adjudicated under the different criteria of the statute.

13. Board appellate counsel's assertion of the very approach actually declared inapplicable by the Board itself constitutes a particularly abusive breach of the rule against utilizing *post hoc* rationalizations of counsel in support of an agency's order. See *N. L. R. B.* v. *Metropolitan Life Insurance Co.*, 380 U. S. 438, 443-444 (1965); *Burlington Truck Lines* v. *U. S.*, 371 U. S. 156, 168 (1962); and *N. L. R. B.* v. *Food Store Employees Union, Local 347*, 417 U. S. 1, 9 (1974).

14. Even if this were a constitutional, rather than Section 7 case, the dislocation of property rights ordered by the lower court would be impermissible. *First*, the interior of the shopping mall is not public

The Act, of course, may grant "broader" rights than the First Amendment, *viz.*, the Act permits access on private property, regardless of its functional equivalence to public property, "where a union has *no other means* at its disposal to communicate with employees other than to use the employer's property," or where the employer discriminates against those engaged in union activities, *Central Hardware*, 407 U. S. at 548 (dissenting opinion; emphasis added). The Act, for example, would permit a dislocation of private property under *Babcock & Wilcox* where a union had no alternative methods of communication (see, e.g., *N. L. R. B.* v. *S. & H. Grossinger's, Inc.*, 372 F. 2d 26, 29 (2nd Cir. 1967)), while the First Amendment may not require access in such a situation. Cf. e.g., *Flower* v. *U. S.*, 407 U. S. 197, 198 (1972). The principle remains, however, that, whether "narrower" or "broader" than the First Amendment, Section 7 cases must be resolved by statutory criteria; as the Board has recognized, "[i]rrespective of what the Board may have held in cases prior to . . . *Central Hardware* . . . the law is now settled that *Logan Valley* decided *only* constitutional issues, not Section 7 rights, and the fact that one's constitutional rights may have been violated in a given case does not solely by virtue of that

property, nor the functional equivalent of public property (see fn. 5, *supra*); *Marsh* v. *Alabama*, 326 U. S. 501 (1946), the genesis of the functional equivalence thesis, has limited current vitality: "*Marsh* involved a 'company town,' an economic anachronism rarely encountered today." *Central Hardware*, 407 U. S. at 545. *Second*, as discussed *infra*, in contrast to *Logan Valley* (391 U. S. at 320, n. 9), "the message sought to be conveyed to the public [here had not] concerned the matter in which that particular market was being operated." The picketing was basically unrelated to the Center; there was no dispute concerning the operation of the Butler store at the Center; there was no labor dispute at the situs; and the employees of Butler at the Center were not even members of the Union. In these circumstances, the pickets were as unrelated to the Center as were the handbillers in *Lloyd*, and, accordingly, because of the availability of alternative means of communication open to them, would not have been able to appropriate Hudgens' private property for their expressive conduct had a court been confronted with the constitutional question. *Logan Valley*, therefore, even if this were a constitutional case, would be inapposite.

fact become a violation of Section 7 of the Act." *S. E. Nichols of Ohio*, 200 NLRB 1130, 1131 (1972) (emphasis the Board's; footnote omitted).

B. Republic Aviation Co. v. N. L. R. B. Is Inapplicable to This Case.

Board appellate counsel's attempt to interject the employee standards of *Republic Aviation* was properly rejected by the Court of Appeals, which characterized it as being "farthest afield", a "misapplication of *Republic* [that is] particularly inappropriate", and a contravention of *Lloyd* and *Central Hardware* (Pet. App., pp. A8-A9). The basis for the *Republic Aviation* rule, which precludes employers from barring employee union solicitation on the work site absent special circumstances of discipline or production, is that such activity between fellow employees on their mutual work premises presents "the very time and place uniquely appropriate and almost solely available to them therefor." *Republic Aviation Corp.*, 51 NLRB 1186, 1195 (1943), quoted with approval by this Court upon review. 324 U. S. at 801, n. 6. Because the countervailing interests of the employer's right to control *access* to his property are not present in such a situation, and only disciplinary considerations are involved, resort to alternative channels of communication is not required. This distinction, as *Babcock & Wilcox* emphasized, is "one of substance." 351 U. S. at 113. It is a distinction, however, which cannot be predicated upon a mechanical application of the definition of "employee".

The *Babcock & Wilcox* test does not turn upon whether the person asserting Section 7 rights is an "employee," but rather, upon whether that person has been invited to the situs in the course of an employment relationship. Thus, while *Babcock & Wilcox* dealt with nonemployees, both the Board and the courts of appeal have held that it also governs the right of access of persons, such as off-duty employees, who, while technically

employees, have no invitation to be on the employer's premises at other times. As the Board explained in *GTE Lenkurt*, 204 NLRB No. 75, 83 LRRM 1684, 1685-1686 (1973), in holding that off-duty employees could be barred from entering their employer's property for Section 7 purposes during shifts other than their own:

> [The off-duty employee's] status is more analogous to that of a nonemployee and he is subject to the principles applicable to nonemployees. This is so because the interests to be balanced in determining the validity of such a rule are very different as between an employee on the premises in connection with his work and an off-duty employee who seeks to enter. The former involves a balancing of statutory rights of self-organization against the employer's interest in production, safety, or discipline, and in this situation, the statutory rights prevail (unless it can be shown that interference with those rights is essential) because an employer may not close off this normal channel of communication among the workers without proper justification. The latter situation, however, requires a balancing of the employees' Section 7 rights against the employer's private property rights. (Footnotes omitted.)

Accord: *Diamond Shamrock Co.* v. *N. L. R. B.*, 443 F. 2d 52, 58 (3rd Cir. 1971) and *McDonnell Douglas Corp.* v. *N. L. R. B.*, 472 F. 2d 539, 547 (8th Cir. 1973), where both courts ruled, contrary to the Board's reliance on *Republic Aviation*, that *Babcock & Wilcox* was determinative of the access rights of off-duty employees seeking to assert Section 7 rights at their places of employment; and *Visceglia, t/a Peddie Building*, fn. 11, *supra*, where the Board and Court of Appeals both applied *Babcock & Wilcox* to determine the access rights of employees who sought to picket their employer on premises where they had no work relationship. The same reasoning similarly encompasses persons, such as the pickets in the instant case (see fn. 7, *supra*), who, while technically employees of a tenant, also had no work relationship at the Center. See, e. g., *N. L. R. B.* v.

Great Atlantic and Pacific Tea Co., 277 F. 2d 759, 763 (5th Cir. 1960), where, relying upon *Babcock & Wilcox*, the court below held that Section 7 created no right for persons employed at certain locations to gain access to other supermarkets where they did not work.

C. The Court of Appeals' Alternative Test, If Correct, Was Misapplied.

The Court of Appeals, on the basis that in *Babcock & Wilcox*, in contrast to the instant case, "the property rights involved were those of the employer, not a third party; and the labor rights involved were organizational rights, not consumer picketing rights," concluded that *Babcock & Wilcox* "is not the complete answer." Pet. App., p. A9. It determined, therefore, that, as a prerequisite to the *Babcock & Wilcox* analysis, "the relationship between the picketing and shopping center operations . . . is relevant to determining whether the pickets have any right *at all* to conduct consumer picketing inside a private enclosed mall . . ." Pet. App., p. A10 (emphasis added). Although Hudgens did not urge this additional test below, and has reservations with respect to the property ownership[15] and labor rights[16] distinctions

15. *Babcock & Wilcox* drew no distinction between whether the property rights were those of an employer or a third party, nor have other courts of appeal in related situations. *N. L. R. B.* v. *Visceglia, supra*, 498 F. 2d at 50; *N. L. R. B.* v. *Solo Cup Co.*, 422 F. 2d 1149 (7th Cir. 1970). Moreover, a differentiation in the *Babcock & Wilcox* accommodation dependent on who possesses title to the property is no more supportable than a variance dependent on whether an employer in a given case is the owner of the property or simply a lessee thereof. Hudgens' property rights and his income are no less at stake than those of the employers involved in *Babcock & Wilcox* and *Central Hardware*, and he is similarly bound by the negative covenants of Section 8 of the Act. There is no reason, therefore, why his constitutionally protected property rights should be accorded any less protection by the Board; indeed, it would appear confiscatory to subject a shopping center owner to the full panoply of the Act's proscriptions in the same fashion as other employers, but to an unequal protection of his property rights.

16. Since organizational rights and consumer picketing rights are both founded in Section 7 of the Act, the Board has applied the identical *Babcock & Wilcox* test irrespective of whether consumer picketing (as in the instant case, *S. E. Nichols of Ohio* and *Visceglia t/a Peddie Buildings)* or organizational activity is involved. To be sure, *Central Hardware* did observe that *Babcock & Wilcox* "requires a 'yielding' of property rights only in the context of an organizational campaign" (407 U. S. at 544); at the same time, however, *Central Hardware* also noted that "[t]he Court in *Babcock* stated the *guiding principle* for adjusting conflicts between *Section 7 rights* and property rights" *(ibid.;* emphasis added). In any event, neither view detracts from Hudgens' approach; it either suggests that, as the Board concluded, *Babcock & Wilcox* alone is determinative or, as the Court of Appeals' concluded, there must also be a relationship test in addition to the *Babcock & Wilcox* analysis.

drawn by the Court of Appeals, even assuming *arguendo* that a relationship standard should be utilized, the Court of Appeals misapplied that criterion in the present case. If, as it held, a relationship requirement is fulfilled as long as picketing is directed to those members of the general public who might patronize any store in a shopping center (Pet. App., p. A11), virtually any picketing directed at a center tenant would meet this test. The relationship test would thus be meaningless surplusage.

A meaningful relationship requirement must focus upon whether there is a labor dispute at the situs of the picketing. As suggested by this Court in *Logan Valley*, the "message sought to be conveyed to the public [must] concern[ed] . . . the manner in which that particular market was being operated." 391 U. S. at 320, n. 9. There is a sound basis for this rule; although there may be a derogation of property rights where a dispute arises concerning the use to which property is being put by a tenant—because the shopping center owner may exercise leverage against the tenant to remedy the problem—no such derogation should be permitted where, owing to the remoteness of the dispute, there is no such meaningful power in the center owner. Thus, for instance, in a dispute involving employees of a tenant working at the situs, a center owner could intervene in the dispute to pressure, or conceivably even remove, an offending tenant to insure tranquility on his property. The sufferance of picketing would then be the price the property owner

would pay for failing to successfully minimize disputes between tenants and their employees. But the property owner should not be required to burden his property as a forum for communicating to the public a dispute at a distant location, not involving any employee who works on his property, and over which he is powerless to exert any influence.

In this case, the Union had no dispute concerning the operation of any store at the Center, nor with the wages paid any employees; nor was it protesting the Butler Center store's non-union status or attempting to organize its employees. The picketing was, in short, wholly unrelated to the use to which the Center property was put; it was, instead, more closely akin to *Lloyd* where the shopping center owner was not required to suffer the presence of demonstrators on his premises because their message did not pertain to the utilization of his property. A relationship test, if properly applied, would result, therefore, in a determination that the pickets had no right to engage in consumer picketing at the Center.

II.

THE BOARD AND COURT OF APPEALS MISAPPLIED THE BABCOCK AND WILCOX TEST OF ALTERNATIVE CHANNELS OF COMMUNICATION.

Both the Board and Court of Appeals disregarded this Court's admonition in *Babcock & Wilcox* that "[a]ccommodation between . . . [Section 7 rights and private property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other." 351 U. S. at 112. This accommodation requires that alternative channels for Section 7 expression must be proven unavailable before an appropriation of constitutionally-protected (see *Lenrich Associates* v. *Heydra*, 264 Or. 122, 504 P. 2d 112 (1972); and *Diamond* v. *Bland*, 11 Cal. 3d 331, 113 Cal. Rptr. 468, 521 p. 2d 460 (1974), *cert. den.*, 419 U. S. 885 (1974)) property rights can be justified. The test, as the Board itself has observed, is "not one of reasonable convenience, but rather whether the [desired audience is] . . . beyond the reach of reasonable efforts to communicate with them." *Monogram Models, Inc.*, 192 NLRB 705, 706 (1971). See also *Dexter Thread Mills*, 199 NLRB 543 (1972), where the Board noted that because alternatives may be either more expensive or less convenient is of no relevance. Nor is a union entitled to always picket at the location where its "psychological pressures" are maximized; it may not picket, for example, inside a store even though this location would surely increase such pressure. See, e.g., *Marshall Field & Co.* v. *N. L. R. B.*, 200 F. 2d 375 (7th Cir. 1952). The *Babcock & Wilcox* rule may thus have "the effect of closing off one channel of communications; but the Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching [its desired audience]." *N. L. R. B.* v. *United Steelworkers of America* [*Nutone, Inc.*], 357 U. S. 357, 363-364 (1958). All that is required is that a union have a safe and effective means of communicating its message—by picketing or otherwise. The Union had such safe and effective means in this case apart from picketing on the Center mall.

Although the Court of Appeals properly found that the Union's intended audience broadly included all potential customers of Butler (Pet. App., p. A12), it concluded that because this audience was so diffuse, in comparison to the relatively limited and definable audience involved in an organizational situation, any alternatives to picketing at or near the mall were, "patently inappropriate." (Pet. App., p. A13). In its view, when a union wishes to engage in shopping center consumer picketing, it can dislocate private property rights virtually at will because "a location at or near the mall [is] essential to any kind of reasonably effective communication." (Pet. App., p. A14). There is, in effect, because of "the realities of the situa-

tion" and "the nature of the use to which the property is put," as well as "the potential for dilution," no other available, effective alternative.

Contrary to the Court of Appeals' view, however, it is precisely the broad intended audience which was the subject of the Union's message that serves to render other alternatives particularly *appropriate*. The Union here manifestly had countless, varied means of communication available, in addition to the picketing in front of the Butler store, as alternative means to reach its desired audience. For example, the Union, in contrast to the situation in *Logan Valley* (see 391 U. S. at 321-323), could have safely and effectively picketed, if it chose to supplement its picketing at the Butler warehouse, on the public right-of-ways to the entrances to the Center. See fn. 2, *supra*. Indeed, as the Board observed in the analogous shopping center situation in *S. E. Nichols, supra*, 200 NLRB at 1132, n. 12: "[T]he record shows that the parking lot is entered from a public street, and no reason appears why the Union could not have made its appeals at that point."[17]

In addition, as the Board observed in *The Falk Corp.*, 192 NLRB 716, 721 (1971), newspaper, radio, and television are alternative means of communication expressly contemplated by *Babcock & Wilcox*. The record here amply demonstrates the effective and economical availability of each of these media[18]—media devices which if suited for fulfilling *Babcock & Wilcox*

17. The assertion that picketing at the entrances to the Center, or presumably even at the entrances to the enclosed mall, would necessarily have "secondary effects" (Pet. App., pp. A15, A19) is belied by the Board's long-established rules regulating common situs picketing. See *N. L. R. B.* v. *Denver Building & Construction Trades Council*, 341 U. S. 675 (1951); and *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950). A union is only required to abide by these well-known rules—as occurs in the construction industry virtually every day—in order to avoid any unlawful "secondary effects."

18. Newspaper (App., pp. 159-162, 65); television (App., pp. 163-167, 66-69); radio (App., pp. 167-171, 70-74).

requirements in the relatively limited audience attendant to the organizational context, are, *a fortiori*, particularly apropos for reaching the broad-based audience which was the subject of the Union's appeal here. In addition, uncontradicted evidence in this case established the availability of numerous other methods—direct mail (App., pp. 171-172), handbills (App., pp. 172-173), billboards (App., pp. 173-174) and other techniques (App., pp. 174-175)—which unions have traditionally utilized in the past[19] to communicate a message (App., pp. 179-180) and which were equally feasible in this case. There is no reason, in sum, why the Union could not have employed, in order to induce customers and potential customers *not* to patronize the Butler Center store, the very same techniques that the Center and Butler have successfully utilized to encourage such patronage. Expert testimony, in fact, was introduced by Hudgens to show that, in attempting to express a message to customers and potential customers of the Center, picketing was both less effective and more expensive than many other means of communication (App., pp. 177-179). The Union's desired audience in this case, in short, was not accessible only through picketing in front of the Butler store; the Union simply chose not to utilize other available and effective alternative channels of communication. It had no such right under the Act.

19. See, e.g., *Honolulu Typographical Union No. 37 (Hawaii Press Newspapers)*, 167 NLRB 1030, 1038 (1967), where, in seeking to communicate a message to patrons at a shopping center, the union engaged in a variety of imaginative techniques on public property to attract "a large and appreciative audience."

respondent's brief

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In the Supreme Court of the United States

OCTOBER TERM, 1975

SCOTT HUDGENS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A15)[1] is reported at 501 F. 2d 161. The Board's supplemental decision and order (Pet. App. A17–A20) are reported at 205 NLRB No. 628. The Board's original decision and order (Pet. App. A33–A40) are reported at 192 NLRB 671.

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[1] "Pet. App." refers to the appendix to the petition; "J.A." refers to the joint appendix printed for this Court "S.A." refers to the Board's supplemental appendix.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1974 (Pet. App. A16). The petition for a writ of certiorari was filed on December 20, 1974, and granted on March 17, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

> Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.
>
> Section 8 (a). It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * *;
>
> Section 13. Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

QUESTION PRESENTED

Whether the Board reached a proper accommodation between property rights and employee rights by concluding that, in the circumstances of this case, the owner of a large shopping center violated the National Labor Relations Act by prohibiting warehouse employees, engaged in a lawful strike against their employer, from seeking support for that strike by picketing the entrances to a retail store in that center leased by the employer.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In January 1971, the warehouse employees of Butler Shoe Company ("Butler"), who are represented by Local 315, Retail, Wholesale and Department Store Union, AFL–CIO (the "Union") (Pet. App. A25, A35–A36; A. 63), went on strike for a new contract (A. 63, 80, 82). In order to gain support for their contract demands, the warehouse employees decided to picket not only Butler's warehouse, but all of its retail stores in the Atlanta area, including the store located in the enclosed mall at the North DeKalb Shopping Center in suburban DeKalb County, Georgia, outside Atlanta (A. 77–78, 80–82, 94).

The North DeKalb Shopping Center is owned and operatedby petitioner Hudgens (Pet. App. A22, 10–11, 113). The center covers approximately 55 acres of land, and consists of a large central structure housing 60 stores and a parking lot surrounding it that can accommodate 2,640 automobiles (Pet. App. A22; A.

11, 16, 50, 103, 111; S.A. 2). On the average, about 45,000 people from the greater Atlanta area visit the center each week (Pet. App. A28; A. 142–143).

The shopping center is located near the intersection of Lawrenceville Highway and North Druid Hills Road, both busy four-lane streets (Pet. App. A35; A. 11, 16, 105, 141–142; S.A. 2. There are five entrances to the center, which open into the parking lot. The three northern entrances are reached by turning off North Druid Hills Road onto three, two-lane streets. These streets, which are lined with both commercial and residential establishments, end after one block at the center entrances, at which there are stop signs. There are no public sidewalks adjacent to these entrances, but there is a public right of way (A. 16, 105–107, 144–145). The two eastern entrances are reached directly from Lawrenceville Highway (A. 16, 105–106, 145–146). There are no stop signs on Lawrenceville Highway for cars entering the center entrances, but there is a stop light 175 feet beyond the northern end of the center, where Lawrenceville intersects with North Druid Hills Road (A. 107, 145–146). There are no public sidewalks adjacent to the Lawrenceville entrances (S.A. 2). Most customers enter the center by cars or buses (A. 142).

The shopping center or mall building, which is surrounded by the parking lot,[2] is located in the middle

[2] There are traffic signs, including speed limit signs, posted on the parking lot (A. 152–153). Hudgens' security staff enforces these limits and, when necessary, the county police are called (A. 150, 153–154).

of the property, approximately 500 feet from each of the entrances to the center (Pet. App. A35; A. 91, 99). While several of the stores in the building have entrances fronting on the parking lot, most of the stores, including that of Butler, can be entered only from the mall inside the building. There are four customer entrances[3] into the building, which are used by 85 to 90 percent of the shoppers in the stores that can be entered only from the mall (Pet. App. A35; A. 11–12, 50, 104). The building is encircled by a raised sidewalk about 10 feet wide, except at the four entrances where it is 25 feet wide (A. 110–111, 113). The doors to the building are open on weekdays from 7 a.m. to 10 p.m., and on Sundays from 10 a.m. to 7 p.m. (A. 112, 150–151).

The inside of the building is a large, enclosed mall. The stores front on aisles, which are 30 to 40 feet wide and intersect (A. 50–51, 110). The aisles contain planters, benches, decorative and drinking fountains, pools, kiosks, a carrousel ride for children, and a charity booth for groups who have obtained a permit. There are restrooms off the aisles (A. 108–109, 113, 116–117, 118, 124–126). The mall building is also used for general promotional activity, such as fashion and camping shows (A. 158–159, 167–168), and it has an auditorium which is leased to approved groups (A. 61–62, 127–128).

All of the stores in the mall building, including Butler's, are owned by and leased from Hudgens

[3] Each entrance is approximately 20 feet wide, with six or eight swinging doors (A. 11).

(A. 113).[4] The lease grants the tenants, their employees, agents, customers, and invitees the "nonexclusive right to use the parking and other common areas" in the shopping center (A. 53). The tenants share in the maintenance costs of the common areas (A. 54, 122)[5]. The lease also provides that tenants shall join the Merchants' Association and pay an initial fee for promotion and an additional monthly fee for continued membership (A. 59). The Merchants' Association leases the auditorium and issues permits for the charity booth in the mall (A. 60, 61–62, 125, 128). Its elected board of directors is the "governing body for the events and advertising and the expense incurred by each on the shopping center" (A. 157–158).

On the morning of January 22, 1971, four warehouse employees entered the enclosed mall with placards reading, "Butler Shoe Warehouse on Strike, AFL–CIO, Local 315" (Pet. App. A36; A. 12, 98). Before the Butler store opened, the four employees sat on a bench near an entrance to the store (Pet. App. A36; A. 12, 98). Douglas Ballard, the general manager of Hudgens' shopping center,[6] noticed the seated employees and told them that they could not picket in the mall

[4] The Rich's store, in a separate building adjacent to the mall building, is owned by Rich (A. 113).

[5] Hudgens has a maintenance staff of four and provides for trash collection. The center also has its own sewage system (A. 121–122, 154).

[6] Concededly, Ballard was acting as Hudgens' agent (A. 11).

or in the parking lot because these areas were private property (Pet. App. A36; A. 12, 78, 90, 98). Ballard also told the employees that they would have to picket on the Lawrenceville Highway or on North Druid Hills Road and that, if they did not leave, they would be arrested (Pet. App. A25–A26; A. 17–18, 19, 79, 90, 98). The employees left the mall, but returned a short time later and began picketing in the area of the mall immediately adjacent to Butler's store (Pet. App. A36; A. 12, 15, 98). The store, which is located where two aisles of the mall intersect, has display windows and an entrance on each of these aisles (A. 15, 50, 85–86, 110). Two pickets walked in parallel lines in each aisle, close to the side of the store (A. 15, 85–86; S.A. 1).

The picketing was peaceful and continued for about 30 minutes (Pet. App. A36; A. 12, 98). At approximately 11:30 a.m., Ballard telephoned the shopping center and had one of the employee-pickets called to a nearby phone (Pet. App. A36; A. 12, 17–18). Ballard warned that, if the picketing did not stop in thirty minutes, he would have the police at the center to lock up the pickets (*ibid.*). Shortly thereafter, Hudgens' attorney told the Union's attorney that picketing was not permitted within the enclosed mall and that, if the pickets did not leave, Hudgens would telephone the DeKalb County Police Department and obtain arrest warrants for criminal trespass (Pet. App. A36;

A13. The pickets left the premises and did not return (Pet. App. A36; A. 91).[7]

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon a charge filed by the Union, the Board held that Hudgens had violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by threatening to cause the arrest of Butler's picketing employees,[8] and entered an order requiring Hudgens to cease and desist from such conduct in the future (Pet. App. A18, A39–A40). The Board found that the employees were engaged in "activity coming directly within the ambit of Section 7, viz. an economic strike engaged in by employees against their own employer" (Pet. App. A18). The Board concluded that "their employer, whose store happens to be located within [Hudgens'] shopping mall, was not insulated from the picketing merely

[7] Subsequently, Hudgens filed suit in the Fulton County Superior Court for a judgment declaring the Union's activity to constitute a trespass in violation of state law. The Georgia Court of Appeals held that the suit was preempted by the instant Board proceedings. Hudgens has filed a petition for certiorari to review that decision. *Scott Hudgens* v. *Local 315, Retail & Wholesale Department Store Union, AFL–CIO*, No. 74–1032.

[8] It is undisputed that Hudgens is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, 29 U.S.C. 152(6) and (7) (Pet. App. A34–A35; A. 5, 8, 11). Since Section 8(a)(1) of the Act makes it an unfair labor practice for "an employer" to "restrain, or coerce employees" in the exercise of their Section 7 rights, a generic employer may violate Section 8(a)(1) with respect to employees other than his own. See *Austin Co.*, 101 NLRB 1257, 1258–1259. See also Section 2(13) of the Act, 29 U.S.C. 152(3).

because someone else, [Hudgens], was the technical owner of the shopping mall and the land surrounding it" (*id.* at A19). The Board was of the view that Butler's warehouse employees were within the scope of Hudgens' invitation to the public to come to the shopping center to do business with its tenants (*ibid.*). The Board added that its decision (*ibid.*)——

> achieves a desirable accommodation between [Hudgens'] property rights and the employees' Section 7 rights by according employees the right to picket their employer at such a proximate location, directly in front of the employer's premises, rather than requiring them to picket at a more distant location which may well be a common situs for entrance to other places of business and thus invite secondary effects.

C. THE COURT OF APPEALS' DECISION

Upon review, the court of appeals enforced the Board's order (Pet. App. A1–A15). The court concluded that this Court's decision in *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, "although having its genesis in the constitutional issues" there raised, "isolates the factors relevant to determining when private property rights of a shopping center owner should be required to yield to the section 7 rights of labor picketers" (*id.* at A10). Applying those factors here, the court held that the Section 7 rights of the picketing employees were entitled to prevail since the picketing was related to the normal functions of the shopping center and

alternatives to the picketing were either unavailable or inadequate (*id.* at A10–A15).

SUMMARY OF ARGUMENT

I

The court below correctly concluded that it was proper to utilize the criteria formulated in *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 and *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, in determining whether the National Labor Relations Act entitled Butler's employees to picket at Hudgens' North DeKalb Shopping Center. For the property here, as in those cases, has assumed "to some significant degree the functional attributes of public property devoted to public use" (*Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539, 547). It was not, as in *Central Hardware*, "private property used only for private purposes" (*ibid.*).

Thus, the shopping center here—which covers 55 acres and has 60 stores and parking facilities for 2,640 cars—is larger than that in *Logan Valley* and as big as that in *Lloyd*. As in *Logan Valley*, there are no public streets or sidewalks traversing the center; the nearest public streets are separated from the building by a 500-foot stretch of parking facilities. Moreover, as in *Lloyd*, the stores are in a central building and most are accessible only from the mall in the interior of the building.

II

Under the *Logan Valley-Lloyd* criteria, a person may peacefully picket or distribute handbills at a shopping center of the type here if (1) the activity is directly related to the use to which the center is being put, and (2) no other reasonable opportunities for conveying the message of the pickets or the handbillers to the intended audience are available. Both of these conditions were satisfied here.

A. The picketing was directed at the labor policies of Butler, the lessee of one of the stores in the shopping center. Although the underlying contract dispute involved Butler's warehouse employees, they were entitled, under Section 7 of the Act, to carry their dispute to their fellow employees working at Butler's store in the center. See *Houston Insulation Contractors Ass'n* v. *National Labor Relations Board*, 386 U.S. 664. And Butler, the employer of both the warehouse and the store employees, was in a position fully to resolve the dispute by granting the warehouse employees' contract demands. Moreover, since "[p]otential customers of Butler's North DeKalb store comprised a group within the scope of the broad invitation issued by Hudgens to the public to come and shop at center stores," the "picketers" message to withhold patronage from the Butler store was directly related to Hudgens' invitation" (Pet. App. A11).

By contrast, the handbilling in *Lloyd* "had no relation to any purpose for which the center was built and being used." *Lloyd Corp.* v. *Tanner*, *supra*, 407

U.S. at 564. There, the "message sought to be conveyed by respondents," a protest against the Vietnam War, "was directed to all members of the public, not solely to patrons of Lloyd Center or of any of its operations." *Ibid.*

B. Here, as in *Logan Valley,* there is no public property in the vicinity of the Butler store where the picketing could reasonably be conducted. The public road entrances to the shopping center are nearly 500 feet away from the building which housed the Butler store. Butler's customers and store employees who are already at the building would be too far away to read the placards of pickets at these road entrances. Nor could the placards adequately be read by them as they entered or left the shopping center, for they would be moving by car or bus, and traffic jams or accidents were likely if the vehicles paused. In addition, the pickets would be placed in danger by walking along the public roads outside the shopping center, for there are no public sidewalks adjacent thereto. Finally, picketing outside the center would run the risk of enmeshing a substantial number of neutrals in the employees' dispute with Butler.

The Union did not have the burden of establishing that it could not have reached the customers of Butler's store by such other methods as newspaper, television, and radio advertising. While on purely private property a proper balance between employee rights and the employer's property rights may require that a non-employee forego an appeal at or near the employer's property if there are other means of mak-

ing that appeal elsewhere (see *Central Hardware, supra*), a different balance is appropriate for quasi public property, such as the shopping center here. On quasi public property, the relevant inquiry is not whether a consumer appeal may be made by means other than picketing and handbilling, but whether there are purely public locations where that activity can be carried on effectively without access to the quasi public property. If no such purely public locations are available, then the appeal can be made on the quasi public property, at least where, as here, it is directly related to the purpose for which the property is being used. The contrary conclusion would permit "businesses situated in the suburbs * * * largely [to] immunize themselves from [on-the-spot] criticism by creating a *cordon sanitaire* of parking lots around their stores." *Amalgamated Food Employees* v. *Logan Valley Plaza, supra,* 391 U.S. at 325.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT HUDGENS VIOLATED SECTION 8(a)(1) OF THE NATIONAL LABOR RELATIONS ACT BY PROHIBITING BUTLER'S WAREHOUSE EMPLOYEES FROM PICKETING THEIR EMPLOYER AT ITS RETAIL STORE LOCATED IN HUDGENS' SHOPPING CENTER

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, guarantees to employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," and Section 8(a)(1), 29 U.S.C. 158(a)(1), prohibits employer interference with that right. Peace-

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ful picketing in support of a lawful objective is a classic form of protected concerted activity. *United Steelworkers* v. *National Labor Relations Board* (*Carrier Corp.*), 376 U.S. 492, 498–499; *National Labor Relations Board* v. *Fruit & Vegetable Packers* (*Tree Fruits*), 377 U.S. 58, 62–63; *International Longshoremen's Ass'n, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, 200–201; *National Labor Relations Board* v. *Cold Storage Corp.*, 203 F. 2d 924, 927 (C.A. 5), certiorari denied, 346 U.S. 818. Its protected status is reinforced by Section 13, 29 U.S.C. 163, which states that nothing in the Act, "except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike." See *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665, 672–673; *National Labor Relations Board* v. *Drivers Local 639* (*Curtis Bros.*), 362 U.S. 274, 281–292, and n. 9.

However, when Section 7 rights conflict with an employer's [9] property rights, it is necessary to balance the competing legitimate interests. See *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793; *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105; *Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539; *Fafnir Bearing Co.* v. *National Labor Relations Board*, 362 F. 2d 716, 722 (C.A. 2). Congress entrusted the Board with the primary responsibility for making this accommodation, and its judgment, if reasonable, should be accepted by the reviewing court. Cf. *National Labor Relations Board* v. *Truck Drivers Local 449* (*Buffalo Linen Exchange*), 353 U.S. 87, 97; *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 235–236. "The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board." *National Labor Relations Board* v. *Weingarten, Inc.*, 420 U.S. 251, 266. And where, in construing the reach of Section 7, the Board engages in the "'difficult and delicate responsibility' of reconciling conflicting interests of labor and management, the balance struck by the Board is 'subject to limited judicial review.'" *Id.* at 267, quoting from *Truck Drivers Local 449, supra*, 353 U.S. at 96.

[9] It is undisputed that Hudgens is "an employer" within the meaning of the relevant provisions of the Act. See n. 8, *supra*.

Guidance as to the proper accommodation between the employer's property rights and the employees' Section 7 rights in the situation here is afforded by this Court's decisions in *Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539, and *Lloyd Corp.* v. *Tanner*, 407 U.S. 551. In those cases, the Court drew a distinction between privately owned property which has assumed "to some significant degree the functional attributes of public property devoted to public use," and "private property used only for private purposes" (407 U.S. at 547). The Court found that a large commercial shopping center—such as that involved in *Lloyd Corp.* and in the earlier *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308—"had displaced, in certain relevant respects, the functions of the normal municipal 'business block'" (407 U.S. at 547). It held that the First Amendment gives to all persons the right peacefully to picket or distribute handbills at such a

shopping center provided that (1) the activity was "'directly related in its purpose to the use to which the shopping center property was being put'," and (2) "no other reasonable opportunities for the pickets to convey their message to their intended audience were available" (407 U.S. at 563).[10] On the other hand, the Court found that the free standing stores in *Central Hardware* did not lose their character as "private property used only for private purposes" because they had parking lots which were "open to the public" and there were other retail stores in the vicinity which were not part of a shopping center complex (407 U.S. at 540, 547). Thus, it held that non-employee union organizers had only such access to that property as was accorded by Section 7 of the National Labor Relations Act—which in that case meant that they were entitled to reach employees on the property only if, by reasonable efforts, they could not reach them by other means. Accord: *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112–113.

This Court did not hold in *Central Hardware,* as petitioner suggests (Br. 12), that First Amendment considerations have no relevance in defining the scope of Section 7 of the Act. First Amendment considerations were deemed inapplicable in *Central Hardware* (407 U.S. at 547) because that case involved purely private property (as opposed to "pri-

[10] With respect to private property which has assumed all of the functions of a municipal business block, the First Amendment affords a right of access without satisfying these conditions. See *Marsh* v. *Alabama*, 326 U.S. 501.

vately owned property" which has "assume[d] to some significant degree the functional attributes of public property devoted to public use") to which the Constitution affords no right of access; there can in that context be no congruence between constitutional rights and those afforded by Section 7 of the National Labor Relations Act. However, where the property involved is the functional equivalent of a business block, the Constitution does afford a right of access. In these circumstances, it is reasonable and proper, in striking a balance between employee rights and property rights for purposes of the National Labor Relations Act, to apply the criteria mandated by the Constitution.[11] The contrary conclusion would lead to the anomaly that employees could obtain greater protection for their right to strike and peacefully picket by court suits than they could by invoking the procedures of the National Labor Relations Act, which were specifically designed to afford such protection. In short, while, as petitioner concedes (Br. 13), Section 7 may, in some circumstances, grant " 'broader' rights than the First Amendment, *viz,* the Act permits access on private property, regardless of its functional equivalence to public property," the rights accorded by Section 7 are not more restricted than those protected by the First Amendment.

The court below correctly concluded that it was proper to utilize the criteria formulated in *Logan Valley* and *Lloyd Corp.* in determining whether the National Labor Relations Act entitled Butler's employ-

[11] Cf. *Thomas* v. *Collins*, 323 U.S. 516, 533–534; *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 617–618.

ees to picket at the shopping center here. For, as we show below, the property here, as in those cases, has assumed "to some significant degree the functional attributes of public property devoted to public use." We further show that the court below also correctly concluded that the *Logan Valley-Lloyd* criteria were satisfied here [12]—i.e., the picketing was directly related to the use of the shopping center, and no other reason-

[12] Nor is the use of those criteria precluded here (see Pet. Br. 12, n. 13) because the Board relied (Pet. App. A18) on its reasoning in *Frank Visceglia, t/a Peddie Buildings*, 203 NLRB 265 (discussed *infra*, p. 34, n. 26), where it had stated that "For the reasons expressed by the Supreme Court in *Central Hardware*, *supra*, we find the principles of *Babcock & Wilcox*, rather than those of *Logan Valley*, to be applicable to the present case" (*id.* at 266–267). In thus recognizing that, in making an accommodation between Section 7 rights and property rights under the National Labor Relations Act, the constitutional criteria enunciated in *Logan Valley* are not automatically appropriate (as the Board had erroneously assumed in *Central Hardware*), the Board did not intend to suggest that those criteria could not be adopted for purposes of the Act where, as here, there is a congruence between Section 7 and constitutional rights.

In any event, the *Babcock & Wilcox-Central Hardware* criteria, which are concerned with organizational activity on wholly private proverty (see *Central Hardware*, *supra*, 407 U.S. at 544–545; and Amicus brief of Chamber of Commerce (pp. 8–9, n. 5)), differ from the *Logan Valley-Lloyd* criteria only in that the showing required to establish the inadequacy of alternative avenues of communication is more stringent in the case of appeals by "outsiders" on wholly private property than it is in the case of such appeals on quasi public property (see *infra*, pp. 29–32). The Administrative Law Judge's findings on alternative avenues of communication (Pet. App. A27–A31), which were not disturbed by the Board (Pet. App. A18–A19), comport with the showing required for quasi public property.

able opportunities for conveying the pickets' message to its intended audience were available.[13]

A. THE SHOPPING CENTER HERE IS SUBSTANTIALLY LIKE THOSE INVOLVED IN LOGAN VALLEY AND LLOYD

In *Logan Valley,* the privately owned shopping center contained two stores at the time of the picketing, although other businesses were then expected and later moved into the center. The center was situated at the intersection of two public roads, one a high speed highway, off which there were five entrances into the center; aside from these entrances, the center was totally separated from the adjoining roads by earthern berms, 12 to 15 feet wide. The buildings in the center were separated from the berms by a 350 to 500 foot expanse of common parking facilities. (391 U.S. at 310–311.)

In *Lloyd,* the shopping center was located on a 50-acre site in downtown Portland, Oregon. It was bounded by four public streets and it was crossed in varying degrees by several other public streets, which had adjacent public sidewalks. Except for these public streets and sidewalks, all of the land and buildings within the center were privately owned. There were 60 commercial establishments, and open and covered

[13] It is not clear whether both of these criteria must be satisfied before access to quasi public property is permitted, or whether it is only necessary to satisfy one of them. Thus, in *Lloyd*, the Court, although finding that the relation criterion was not satisfied, went on to show that neither was the alternative forum criterion. See Note, *The Supreme Court, 1971 Term*, 86 Harv. L. Rev. 1, 128–129 (1972). In any event, as we show below, both of these criteria are satisfied here.

parking facilities which accommodated more than 1,000 automobiles. The stores were all located within a single, multi-level building complex. Within this complex, in addition to the stores, there were parking facilities, malls, private sidewalks, stairways, escalators, gardens, and an auditorium and a skating rink. Some of the stores opened directly on the outside public sidewalks, but most opened on the interior privately owned malls; some stores opened on both. The malls were private, interior promenades with 10-foot sidewalks serving the stores, and with a center strip 30 feet wide in which flowers and shrubs were planted, and statuary, fountains, benches, and other amenities were located. (407 U.S. at 553.)

The shopping center here—which covers 55 acres and has 60 stores and parking facilities for 2,640 cars—is larger than that in *Logan Valley* and as big as that in *Lloyd*. Like *Logan Valley*, but unlike *Lloyd*, there are no public streets or sidewalks traversing the center; the nearest public streets are separated from the building by a 500-foot stretch of parking facilities. Moreover, here, as in *Lloyd*, most of the stores are in an enclosed central building and are accessible only from the interior of the building, which has wide aisles that contain benches and other facilities normally found on public sidewalks or outdoor malls and parks.

In sum, the same factors which led the Court to conclude that the shopping centers in *Logan Valley* and *Lloyd* were privately owned property which had assumed "to some significant degree the functional attributes of public property devoted to public use" (*Central Hardware, supra,* 407 U.S. at 547) are present here.[14] Unlike the situation in *Central Hardware*, the argument that the shopping center here has "acquired the characteristics of a public municipal facility" is not dependent upon the one fact that the parking lots are " 'open to the public' " (*ibid.*).

B. THE PICKETING WAS DIRECTLY RELATED TO THE USE OF THE CENTER

As shown (*supra,* pp. 6–7), Butler's warehouse employees sought to put economic pressure on their employer in support of their lawful contract demands by appealing, through peaceful picketing at Butler's retail store in the shopping center, to their fellow Butler employees not to work for Butler, and to Butler's customers not to purchase its products. Thus, the picketing was addressed to the labor policies of Butler, who was in a position fully to resolve the dispute by granting the picketers' contract demands. Moreover, as the court below noted (Pet. App. A11), "[p]otential customers of Butler's North DeKalb store comprised a group within the scope of the broad invitation issued by Hudgens to the public to come and shop at center stores"; the "picketers' message to withhold patronage from the Butler store was directly related to Hudgens' invitation * * *." In these circumstances, the picketing was related to

[14] By contrast, *S. E. Nichols of Ohio*, 200 NLRB 1130 (Pet. Br. 13–14), involved wholly private property, like that in *Central Hardware* (see Pet. App. A26, n. 1).

the use of the center no less than was the picketing in *Logan Valley.*

Nor is a different conclusion required by petitioner's contention (Br. 17–18; CC Br. 8–9) that, in *Logan Valley,* the picketers, who were non-employees, were seeking to organize, and thus were concerned with the labor policies of, the store in the shopping center. The question is not whether the activity is tied to a labor dispute involving the particular store, but whether it has a "relation to any purpose for which the center was built and being used." *Lloyd Corp.* v. *Tanner, supra,* 407 U.S. at 564. Since the center was designed to attract customers to the stores therein and since the picketing sought to induce Butler's customers to withhold such patronage, it was directly related to a "purpose for which the center was built and being used." [15]

This view is confirmed by contrasting the appeal in *Lloyd.* There, the Court found that the handbilling, which protested the Vietnam War, "had no relation to any purpose for which the center was built and being used." For the "message sought to be conveyed by respondents was directed to all members of the public, not solely to patrons of Lloyd Center or any of its operations. Respondents could have distributed these

[15] Petitioner contends that, where there is a "dispute involving employees of a tenant working at the situs, a center owner could intervene in the dispute to pressure, or conceivably even remove, an offending tenant to insure tranquility on his property" (Br. 17; see also CC Br. 12–13). There is no reason why Hudgens does not have the same leverage over Butler; while the dispute did not directly involve Butler's store employees, it spilled over to Hudgens' property and Butler had power to resolve it.

handbills on any public street, on any public sidewalk, in any public park, or in any public building in the city of Portland." *Lloyd Corp.* v. *Tanner, supra,* 407 U.S. at 564. Here, by contrast, the message sought to be conveyed by the picketers was specifically directed to patrons of Butler's retail store and sought to induce them to withhold patronage from that store because of Butler's labor policies.[16]

Moreover, even if, contrary to the foregoing, a labor dispute involving the particular store be required, it is present here. For it is well settled that, under the National Labor Relations Act, employees in one bargaining unit, who are engaged in a labor dispute with their employer, may lawfully appeal for support, and thereby extend their dispute, to other units of the same employer.[17] See *Houston Insulation Contractors Ass'n* v. *National Labor Relations Board,* 386 U.S. 664; *National Labor Relations Board* v. *General Drivers, Local 968,* 225 F. 2d 205 (C.A. 5), certiorari denied, 350 U.S. 914; *Milwaukee Plywood Co.* v. *National Labor Relations Board,* 285 F. 2d 325 (C.A. 7).

[16] As the dissenters in *Lloyd* noted: "If respondents had distributed handbills complaining about one or more stores in Lloyd Center or about the Center itself, petitioner concedes that our decision in *Logan Valley* would insulate that conduct from proscription by the Center" (407 U.S. at 579–580). The dissenters further noted that the "record indicates that when unions have picketed inside the Mall, Lloyd Center has voiced no objections" (*id.* at 580, n. 4).

[17] The parties stipulated that Butler was a single employer for purposes of the Act, although its warehouse and its retail store constituted separate units for bargaining purposes (A. 147–148).

As this Court stated in *Houston Insulation, supra,* 386 U.S. at 668–669:

> Primary employees have traditionally been assured the right to take concerted action against their employer to gain the "mutual aid or protection" guaranteed by § 7 of the National Labor Relations Act, as amended, 61 Stat. 140, whether or not the resolution of the particular dispute directly affects all of them. As Judge Learned Hand stated in *Labor Board* v. *Peter Cailler Kohler Swiss Chocolates Co.,* 130 F. 2d 503, 505–506:
>
> > "When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts."

C. PICKETING AT THE ENTRANCES TO BUTLER'S STORE AFFORDED THE ONLY REASONABLE MEANS OF CONVEYING THE PICKETS' MESSAGE TO ITS INTENDED AUDIENCE

The Board found, and the court of appeals sustained its finding (Pet App. A14), that the pickets were

forced to leave the shopping center altogether.[18] Thus, the nearest wholly public area in which the picketing could occur was on the public highways some 500 feet away. As we show below (pp. 27–28, *infra*), this was not a reasonable alternative.

Petitioner suggests (Br. 6 n. 9), however, that the pickets were informed that picketing was permissible at the entrances to the mall on the outside sidewalk and in the shopping center parking lot. This assertion is at best ambiguous because petitioner refrains from representing that his policy is to permit picketing in these areas, and the record is to the contrary. See n. 18, *supra,* and the Administrative Law Judge's finding that, while petitioner asserted in his brief that picketing was permissible in the parking lot

[18] This finding is supported by substantial evidence. Three pickets, who appeared as witnesses at the Board hearing, testified that Hudgens' agent, Ballard, told them that they would have to picket on the public roads (A. 79, 90, 98). This testimony is consistent with Hudgens' admitted policy of not allowing "anyone to march up and down with placards * * * in the mall and the parking lot" (A. 123). The Administrative Law Judge (Pet. App. A25–A26) credited the pickets' testimony and discredited Ballard's testimony (A. 134–135) that he told the pickets they could picket on the parking lot or on the public roads. The Board affirmed this finding (Pet. App. A–18).

There is no evidentiary support for petitioner's assertion (Br. 6, n. 9) that the parties were nonetheless put on notice that "the proscription upon the Union's picketing pertained only to the mall interior and that picketing elsewhere on Hudgens' property was permissible." Moreover, the Ballard affidavit in the printed appendix (A. 19) is not accurate. The phrase "our lawyer, Dock Heard Davis told them that they could picket on the sidewalks to the mall" (*ibid.*) was deleted from the affidavit which was placed in the record.

area, he also claimed the right "to eject the pickets from the parking lot area, if one day [he] should so choose" (Pet. App. A26).

Indeed, when petitioner sought a declaration of rights under the Georgia criminal trespass law in the state courts, he made no distinction between the enclosed mall and other center areas; rather, he sought a declaration of his right to exclude the pickets from the shopping center entirely. See page 4 of the Appendix to the petition for a writ of certiorari in *Hudgens* v. *Local 315 Retail, Wholesale and Department Store Union, AFL–CIO,* No. 74–1032.[19] Moreover, the claimed right to exclude the pickets from the center entirely is consistent with petitioner's arguments in his brief here that the test of *National Labor Relations Board* v. *Babcock & Wilcox Co., supra,* 351 U.S. 105, affords no right of access in this case.[20]

Thus, this is not a case, as petitioner implies (Br. 6, n. 9), where the Board misapprehended the employer's policy concerning picketing. And, to the extent petitioner is now making an alternative contention—that, if *Logan Valley-Lloyd* criteria are applicable, the existence of exterior center locations are a reasonable alternative to picketing inside the mall—that alternative was properly rejected by the Board. See p. 33 and n. 25, *infra.*

[19] And in *Steffel* v. *Thompson,* 415 U.S. 452, 455, which also involved petitioner's shopping center, individuals were forced to discontinue handbilling "on an exterior sidewalk" of the center.

[20] As we have shown (pp. 14–18, *supra*), *Babcock & Wilcox* has no application here.

1. As the court below noted (Pet. App. A12), "the intended audience of the picketing in the instant case included not only the employees of Butler's at the North DeKalb Shopping Center but also the potential customers of Butler's North DeKalb store. This latter audience was only identifiable as part of the citizenry of greater Atlanta until it approached the store * * *." "This contrasts," the court added (*ibid.*), "with organizational campaigns in which the audience solicited is composed of employees of a particular employer, a limited usually identifiable group, which often can be reached very effectively by means other than personal contact on the employer's private property."[21] Moreover, picketing is uniquely an activity which is dependent for success on the location where it takes place. As this Court has indicated (*Hughes* v. *Superior Court,* 339 U.S. 460, 465):

> Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word. * * *

See also the findings of the Administrative Law Judge (Pet. App. A29–A31), which were accepted by the

[21] As noted (*supra,* p. 18, n. 12), organizational campaigns were involved in *Babcock & Wilcox,* and *Central Hardware.*

Board (*id.* at A18), that there were no reasonable alternatives to picketing at the shopping center. And see *United Steelworkers* v. *National Labor Relations Board, supra,* 376 U.S. at 499.

2. Here, as in *Logan Valley,* there is no public property in the vicinity of the Butler store where the picketing could reasonably be carried on. In *Logan Valley,* the Court sanctioned picketing in the parcel pickup area in front of the Weis store, and the portion of the parking lot immediately adjacent thereto, because: (a) the nearest wholly public areas for picketing were the berms surrounding the shopping center, some 350 to 500 feet away; (b) since all entry onto the mall premises by Weis' customers was by vehicle from the roads along which the berms ran, it would be difficult for them to read the placards of pickets located on the berms or the public roads; (c) the pickets would be placed in some danger by being forced to walk along heavily traveled roads; and (d) if the picketing took place outside the shopping center, it would be difficult to limit its effect to Weis alone (391 U.S. at 322–323).

Similarly here, the nearest wholly public areas for picketing are at the public road entrances to the shopping center, which are nearly 500 feet away from the building which housed the Butler store. Butler's customers and store employees enter the shopping center by vehicle via the public roads, including Lawrenceville Highway, a busy four-lane road. Those already at

the building would be too far away to read the placards of pickets at the entrances to the shopping center; indeed, those inside the building would not be able to see the pickets or their placards at all. Nor could the placards adequately be read by Butler's customers and store employees as they entered or left the shopping center for they would be moving by car or bus, and there would be a danger of traffic jams or accidents if the vehicles paused. In addition, the pickets would be placed in some danger by walking along the public roads outside the shopping center, for there are no public sidewalks at the point where they meet the shopping center or its entrances, and the rights of way at each entrance are not adequate for patrolling. Finally, picketing outside the center would "render it very difficult for the [employees] to limit its effect to [Butler] only" (*Logan Valley, supra,* 391 U.S. at 323).[22] The enmeshment of a substantial number of neutrals in the employees' dispute with Butler, in turn, would be contrary to Congress' objective, in enacting Section 8(b)(4) of the Act, "to restrict the area of industrial conflict" to the primary disputants. *Local 1976, United Brotherhood of Carpenters* v. *National Labor Relations Board* (*Sand Door*), 357 U.S. 93, 100. See also *Honolulu Typographical Union No. 37* v. *National Labor Relations*

[22] Indeed, the risk of broadening the appeal would be greater here than in *Logan Valley* since there are 60 establishments in the North DeKalb Center, while there were only two in Logan Valley Plaza at the time of the picketing there.

Board, 401 F. 2d 952, 957–958 (C.A.D.C.); *Retail Fruit & Vegetable Clerks* v. *National Labor Relations Board* (*Crystal Palace Markets*), 249 F. 2d 591 (C.A. 9).

In contrast, the center involved in *Lloyd* was within the City of Portland, was bounded and traversed by public streets and sidewalks, and included a public park. As the Court stated, the central building complex in Lloyd Center "was surrounded by public sidewalks, totaling 66 linear blocks," and "[a]ll persons who enter or leave the private areas within the complex must cross public streets and sidewalks, either on foot or in automobiles." *Lloyd, supra*, 407 U.S. at 566. Moreover, the handbills were not related to any particular store in the center, but could have been distributed "on any public street, on any public sidewalk, in any public park, or in any public building in the city of Portland." *Id.* at 564.

3. Contrary to petitioner's contention (Br. 18–21; CC Br. 15–16), the Union did not have the burden of establishing that it could not have reached the customers of Butler's North DeKalb store by newspaper, television, and radio advertising, direct mailing, or other advertising devices directed at the geographical area from which that store drew its customers. Even if these methods were economical and effective in attracting customers to the shopping center for commercial purposes,[23] the Union was not required to forego its

[23] The evidence adduced by petitioner merely shows that such methods had been used to promote various programs and thereby to attract persons to the shopping center as a whole, rather than to any particular store (A. 159, 163, 167–168). This evidence hardly measures the effectiveness of those methods in keeping customers away from a particular shop. Moreover, as the court below noted (Pet. App. A14):

"[A]ll of the Butler stores in the Atlanta area were being picketed at the time the instant dispute arose. Since North DeKalb Shopping Center draws its customers from the entire Atlanta area, it would be totally unreasonable to require the union to advertise through the entire Atlanta area to reach the potential customers of this one remaining store. An accommodation which required such a procedure would unjustifiably denigrate section 7 rights."

See also Pet. App. A30.

right, guaranteed by the Constitution and hence also by Section 7 of the Act (see *supra*, p. 16–17, n. 12), to make its appeal to customers of the Butler store through peaceful picketing at a location in reasonable proximity to that store.

Thus, while on purely private property a proper balance between employee rights and the employer's property rights may require that a non-employee forego an appeal at or near the employer's property if there are other means of making that appeal elsewhere (see *Babcock & Wilcox* and *Central Hardware, supra*), a different balance is appropriate for quasi public property, such as the shopping center here. On quasi public property, the relevant inquiry is not whether other methods of making a consumer appeal are available, but, if such traditional location-oriented methods as picketing and handbilling are chosen for that purpose, whether there are purely public locations

where that activity can be carried on effectively without access to the quasi public property. If no such purely public locations are available, then the appeal can be made on the quasi public property, at least where, as here, it is directly related to the purpose for which the property is being used.

Accordingly, in *Logan Valley,* the Court did not inquire—as it would have in the case of purely private property governed by the *Babcock & Wilcox-Central Hardware* criteria—whether there were other effective methods besides picketing for organizing the employees at the Weis market. Nor in *Lloyd* did it inquire whether newspaper advertising would have been as effective as handbilling for conveying the anti-war message to the public. Rather, in both cases, the pertinent question was whether there were purely public locations in the vicinity where the picketers or handbillers could convey their message effectively without access to the quasi public property. See *Lloyd Corp.* v. *Tanner, supra,* 407 U.S. at 566, and n. 12.

The contrary position urged by petitioner—*i.e.,* that picketing or handbilling can be resorted to only if the public could not effectively be reached by other media—would produce a result "at variance with the goal of free expression and communication that is the heart of the First Amendment." "Business enterprises located in downtown areas would be subject to on-the-spot public criticism for their practices, but businesses situated in the suburbs could largely immunize themselves from similar criticism by creating a *cordon sanitaire* of parking lots around their stores." *Amalgamated Food Employees* v. *Logan Valley Plaza, supra,* 391 U.S. at 324–325.

4. As noted, *supra,* the picketing in *Logan Valley* occurred in the parcel pickup area and the parking area in front of the Weis store; whereas here the picketing occurred, not on the private sidewalk outside of the building which housed the Butler store, but on the mall inside of that building, in the area adjacent to the Butler store. Contrary to petitioner's contention (Br. 12–13, n. 14), permitting picketing in the enclosed mall near Butler's store is not the equivalent of permitting it within the store itself. As shown (*supra,* pp. 4–5), since most of the stores are accessible only from the interior of the building, the aisles in the enclosed mall, which are 35 to 40 feet wide, provide the equivalent of public sidewalks in front of the stores. Indeed, the mall contains benches and other facilities normally found on public sidewalks or malls. The enclosed feature of the mall simply affords the stores' customers protection from the elements (A. 116); there is no evidence that it was intended to make the mall more restricted than the rest of the shopping center.[24] Cf. *In re Hoffman,* 67 Cal. 2d 845, 851, 434 P. 2d 353, 357; *Wolin* v. *Port Authority,* 392 F. 2d 83 (C.A. 2), certiorari denied, 393 U.S. 940.

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[24] The doors of the building are open to the public on weekdays from 7 a.m. to 10 p.m., and on Sundays from 10 a.m. until 7 p.m. (*supra,* p. 5).

Moreover, even if it were assumed that petitioner would have permitted picketing on the outside sidewalk at the mall entrances or on the parking lot (but see pp. 25–26, *supra*), such areas, which are removed from the immediate vicinity of Butler's store, do not present reasonable alternatives to picketing on the 35–40 feet wide aisles adjacent to Butler's store. Thus, the Board properly concluded (Pet. App. A19) that its order achieves:

> * * * a desirable accommodation between [petitioner's] property rights and the employees' Section 7 rights by according employees the right to picket their employer at such a proximate location, directly in front of the employer's premises, *rather than requiring them to picket at a more distant location which may well be a common situs for entrance to other places of business and thus invite secondary effects.* [Emphasis added.][25]

Finally, it is significant that the picketing here was confined to the immediate area in front of the Butler store, it was peaceful, and it did not obstruct the entrances to the store or interfere with the passage of people in the aisles (A. 80, 85–86, 95–96, 100).[26]

[25] Although the Board's Supplemental Decision does not expressly refer to the mall entrances on the exterior sidewalk or the parking lot, the Board's conclusion that those areas do not represent reasonable alternatives to picketing inside the mall is indicated by the provision of its order which requires petitioner to cease and desist from barring peaceful picketing "within the enclosed mall area of respondent's shopping center" (Pet. App. A39). Thus, while the decision concerning this point may perhaps be "of less than ideal clarity," the Board's "path may reasonably be discerned" and should be upheld. See *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System*, 419 U.S. 281, 286.

[26] This case is thus distinguishable from *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223, and *Marshall Field & Co.* v. *National Labor Relations Board*, 200 F. 2d 375 (C.A. 7). In *Taggart*, this Court, finding that certiorari had been improvidently granted, left standing a decision of the Alabama Supreme Court which was premised on a trial court finding that picketing on a narrow 4–5 foot sidewalk had caused actual customer obstruction (214 So. 2d 913, 919). And in *Marshall Field* the record showed actual disruptions by "loud and rowdy" organizers, inside a department store (200 F. 2d at 378, 382).

Similarly distinguishable is *National Labor Relations Board* v. *Visceglia, t/a Peddie Buildings*, 498 F. 2d 43 (C.A. 3). The Third Circuit there rejected the Board's finding that the private owners of an industrial park violated the Act by excluding employees of a lessee from picketing inside the park. An industrial park does not as clearly have the "functional attributes of public property devoted to public use" as does a shopping center of the type here. Moreover, the Third Circuit found that the record in that case did not present the issue "whether *Logan Valley* applies to pickets (labor or others) in industrial parks" (*id.* at 45, n. 3). The court also found that, unlike here, there was "no evidence" that the pickets could not have effectively communicated their message "to the appropriate people" at the entrance to the park (*id.* at 49).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Supreme Court of the United States

October Term, 1975

SCOTT HUDGENS, An Individual,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

AND

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO

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On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO

The opinions below, the basis of this court's jurisdiction and the statutory provisions involved are set out at pp. 1-2 of petitioner's brief.

QUESTION PRESENTED

Does § 7 of the National Labor Relations Act protect the right of employees of a store owner to engage in peaceful picketing in support of their strike against him at the entrance to his store, where that entrance is on land leased by the store owner from another?

STATEMENT OF THE CASE

The court below stated the issue presented, its resolution of that issue, and the stipulated underlying facts as follows:

> "The specific issue presented is whether a shopping center owner violated sections 7 and 8(a)(1) of the NLRA by prohibiting warehouse employees of the company owning one of the center's retail store tenants from picketing the entrances to the store in aid of a strike by warehouse employees. We affirm the finding by the National Labor Relations Board (Board) of an unfair labor practice and enforce its order.
>
> "The individual petitioner, Scott Hudgens, owns North DeKalb Shopping Center, a large 60-store retail shopping center located in unincorporated suburban Atlanta, but drawing its customers from throughout the metropolitan area. Like many modern shopping centers, this one consists of a single large building constructed around an enclosed mall. The mall provides an arcade 40 feet in width which is intersected by 30 feet wide auxiliary aisles connecting it to public entrances opening on the surrounding parking area. Although some center stores have entrances fronting only the parking lot and a few can be entered from either the mall or the parking area, most can only be entered from the mall. Eighty-five to ninety percent of the customers of these latter stores enter the building through one of the four primary entrances to the mall. A raised sidewalk encircling the building separates it from the large adjacent parking lot. There are five driveway entrances to the parking lot. Hudgens, as landlord, has a continuing interest in the commercial success of the center's tenants, since his leases with all but one of the stores are of the percentage type, *i.e.*, rentals are calculated on a ratio of tenant's gross sales over a guaranteed minimum rent. Additionally, Hudgens maintains a security system and exercices control and care of the common areas of the shopping center, including the mall itself and the parking lot.

> "In January 1971 warehouse employees of the Butler Shoe Company in Atlanta went on strike protesting the company's failure to agree to certain union demands in its contract negotiations with Local 315, Retail and Wholesale Department Store Union AFL-CIO, the bargaining representative of the warehouse employees. To support this strike, the union decided to picket not only the Butler's warehouse but all of its retail stores in the Atlanta area as well. Accordingly, on January 22, 1971 four warehouse employees went to North DeKalb Mall with signs reading "Butler Shoe Warehouse on Strike, AFL-CIO Local 315" to picket the two entrances to the Butler Shoe Store, both located inside the mall. Before the store opened for the day's business, Douglas Ballard, the general manager of the shopping center, noticed the potential pickets and asked them to leave, stating that picketing was not permitted in the mall under any circumstances.
>
> "The warehouse employees left, but returned within the hour and began picketing in front of the entrances to Butler's. After they had picketed for about thirty minutes, Ballard informed them by telephone that he would have them arrested for trespassing, if they continued. The pickets then departed, and subsequently, the union filed an unfair labor practice charge against Hugens with the Board." (Pet. App. A-1-A3; footnotes omitted.)

ARGUMENT

I

This proceeding began when union members who were peacefully picketing in support of a lawful strike at the entrance to the struck premises located on a privately owned shopping mall were threatened with arrest under the state trespass law. In the face of that threat the respondent Union did not adamantly maintain its position and force a confrontation (cf. *Longshoremen* v. *Ariadne Co.*, 397 U.S. 195, 201-202 (White, J., concurring)), nor did it go to court to assert a First Amendment claim for access to the mall as a public forum (cf. *Food Employees* v. *Logan Plaza*, 391 U.S. 308). Rather, it filed a charge with the National Labor Relations Board to vindicate its members' right under § 7 of the National Labor Relations Act (hereafter the Act) "to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or for other mutual aid and protection." The question, therefore, is whether the NLRA vouchsafes the right to engage in peaceful strike activity against the owner of a store at the entrance to that store where that entrance is on land leased by the store owner from another.

(a) "[C]ollective bargaining with the right to strike at its core, is the essence of the federal scheme." (*Bus Employees* v. *Missouri*, 374 U.S. 74, 82.) And, picketing "has traditionally been a major weapon to implement the goals of a strike." (*Steelworkers* v. *Labor Board*, 376 U.S. 492, 499.) Thus, restrictions against peaceful picketing "obviously impede the right to strike." (*Labor Board* v. *Drivers Local Union*, 362 U.S. 274, 282.) Indeed, the two are so

closely intertwined that "picketing has been equated with striking." (*Id.* at 281, n. 9.)

The right to utilize economic force is central to the statutory scheme because "when legitimately employed" it "in great measure implements and supports the principles of the collective bargaining system." (*Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 234.) That right is "a 'prime motive power for agreements in free collective bargaining.' " (*Labor Board* v. *Insurance Agents*, 361 U.S. 477, 489.) The use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining." (*Id.* at 495.)

Congress has sanctioned and safeguarded the strike and the picket line because "it was recognized from the beginning that agreement might in some cases be impossible [in collective bargaining] and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement." (*Porter Co.* v. *NLRB*, 397 U.S. 99, 103-104.) The "Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak." (*Id.* at 109.) Since our system of free collective bargaining does not countenance "government control of the results of negotiation" (*Insurance Agents*, 361 U.S. at 490), and does not provide for "compulsory arbitration, • • • the strike has been the ultimate sanction of the union" (*Railway Employees* v. *Florida E.C.R. Co.*, 384 U.S. 238, 244).

Congress has therefore shown "repeated solicitude for

the right to strike * * *. While Congress has from time to time revamped and redirected national labor policy, its concern for the integrity of the strike weapon has remained constant." (*Erie Resistor*, 373 U.S. at 234.) Pursuant to the Congressional plan self-help is a continuation of the bargaining process just as Bismarck considered war to be a continuation of diplomacy by other means.

The NLRA not only institutionalizes economic warfare, it demarcates the battlefield. As Mr. Justice White explained for a unanimous Court: "The primary strike * * * is aimed at applying economic pressure by halting the day-to-day operations of the struck employer." (*Steelworkers*, 376 U.S. at 499.) Since picketing in support of a strike "has characteristically been aimed at all those approaching the situs [occupied by the struck employer] whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt" (*id.*), the *Steelworkers* Court held: "In light of this traditional goal of primary pressures we think Congress intended to preserve the right to picket during a strike a gate [at that situs] reserved for employees of neutral delivery men furnishing day-to-day service essential to the employer's regular operations" (*id.*). And, Justice White squarely rejected the employer's argument that "would [have] distinguish[ed] between picketing an entrance to a struck plant which is owned by the primary employer and picketing a gate which by design or otherwise has been conveyed to a neutral furnishing delivery service," explaining that this formalistic approach would create "an anomaly which we do not believe Congress intended." (*Id.* at 501.)

In sum, the national labor policy creates not merely the right to peacefully picket *somewhere* in support of a lawful

economic strike, it creates the precise right to do so at the "entrance to a struck" employer's premises.

(b) There can be no doubt, and petitioner does not deny, that a threat to arrest those engaging in § 7 activity is an "interference" with that activity within the meaning of § 8(a)(1). In this case the conclusion that this interference constituted an unfair labor practice would follow even if its practical effects were minimal. When Congress has determined that the right to engage in a particular form of self-help—here the right to engage in picketing in support of an economic strike at the "entrance to a struck" employer's premises (*Steelworkers*, 376 U.S. at 501)—effectuates the national labor policy, that determination cannot be set aside on the theory that other alternatives, (*viz.*, in this instance, picketing at another location or use of the mass media) are a sufficient substitute. Congress is the sole "arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands." (*Insurance Agents*, 361 U.S. at 497.)

Moreover, in this case the disadvantages to the Union of all the available alternatives were profound. The court below concluded:

> "The alternatives of picketing at the mall entrances or on the parking lots were not available to the union. Confronted with * * * conflicting testimony in this issue, the administrative law judge found as a fact that Ballard (the shopping center manager) told the pickets that they would have to remove themselves to the public thoroughfares. We accept this finding. * * * Nor was picketing on the public streets adjacent to the shopping center an acceptable alternative. The closest such location for picketing was approximately 500 ft. from the mall. The problems with this type of picketing * * *

[are]: (1) difficulty in reading picket signs, (2) traffic danger to pickets and (3) difficulty and hazard in handing out handbills. • • • Additionally, the farther the message is removed from the point at which action is to be taken the greater the potential for dilution or total loss of effect. • • • Finally, picketing at the entrances to the shopping center parking lot would render it difficult for the union to limit the effect of its picketing to Butler's only." (Pet. App. A14-A15.)

(c) Petitioner's asserted justification for the interference worked on § 7 rights is that "under the Georgia Criminal Trespass Law, it had a right to exclude the Union's pickets." **(Pet. Br. 16-17, n. 10.)**

The short but complete answer to that contention is the conclusion in *Steelworkers* that allowing a struck employer to insulate himself from the economic pressures of "traditional" primary picketing during a lawful strike through "convey[ance]" of title would create "an anomaly which we do not believe Congress intended." (376 U.S. at 501.) The controlling principle is that state law cannot be applied so as to limit the use of an economic weapon granted by Congress. As Mr. Justice Stewart wrote in *Teamsters Union* v. *Morton*, 377 U.S. 252, 258, 259-260:

> "[I]t is • • • necessary to determine whether • • • 'Congress occupied this field and closed it to state regulation.' *Automobile Workers* v. *O'Brien*, 339 U.S. 454, 457. • • • The answer to that question ultimately depends upon whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation. *Colorado Anti-Discrimination Comm'n.* v. *Continental Air Lines*, 372 U.S. 714, 722.
>
> • • • •
>
> "[The] weapon of self-help, [action under state law,] permitted by federal law, formed an integral part

> of the petitioner's effort to achieve bargaining goals during negotiations with the respondent. *Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. Electrical Workers Local 761* v. *Labor Board*, 366 U.S. 667, 672. If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." (Emphasis added.)

The federal labor laws' supercession of inconsistent state law was most recently recognized in *Letter Carriers* v. *Austin*, 418 U.S. 264. The question there was whether "state libel judgments • • • [could] be squared with the freedom of speech in labor disputes guaranteed under federal law." (*Id.* at 266.) In answering that question in the negative, Mr. Justice Marshall observed that in *Linn* v. *Plant Guard Workers*, 383 U.S. 53:

> "A bare majority of this Court held that the NLRA did not completely pre-empt the application of state laws to libels published during labor disputes. The Court found that the exercise of state jurisdiction over such defamation actions would be a 'merely peripheral concern' of the federal labor laws, within the meaning of *Garmon* [359 U.S. 236], as long as appropriate substantive limitations were imposed to insure that the freedom of speech guaranteed by federal law was protected. Further, the Court recognized an 'overriding state interest' in protecting [state] residents from malicious libels. 383 U.S. at 61. Mr. Justice Clark, writing the opinion for the Court, also pointed out that appli-

cation of state law to libels occurring during labor disputes would not significantly interfere with the NLRB's role in considering arguable contemporaneous violations of the Act. • • •

"On the other hand, the Court recognized the danger that unrestricted libel actions under state law could easily interfere with federal labor policy. • • • [The] freewheeling use of the written and spoken word, we found [in *Linn*] has been expressly fostered by Congress and approved by the NLRB. • • •

"The Court therefore found it necessary to impose substantive restrictions on the state libel laws to be applied to defamatory statements in labor disputes in order to prevent "unwarranted intrusion upon free discussion envisioned by the Act." [383 U.S. at 65.] The Court looked to the NLRB's decisions, and found that 'although the Board tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees, it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false.' *Id.*, at 61. The Court therefore found it appropriate to adopt by analogy the standards of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). Accordingly, we held that libel actions under state law were pre-empted by the federal labor laws to the extent that the State sought to make actionable defamatory statements in labor disputes which were published without knowledge of their falsity or reckless disregard for the truth." (418 U.S. at 271-272.)

The reasoning of *Letter Carriers* and *Linn* and their antecedents under the Supremacy Clause is fully applicable here. To be sure, in *Letter Carriers* and *Linn* the state law of torts superseded was the law of defamation which vindi-

cates society's "pervasive and strong interest in preventing and redressing attacks upon reputation" (*Rosenblatt* v. *Baer*, 383 U.S. 75, 86); here, the law of torts involved is that of trespass which vindicates individual rights in property. But the authority of Congress as an incident of its Commerce power to regulate the latter private interest is surely no less than its authority to regulate the former. (*Heart of Atlanta Motel* v. *United States*, 379 U.S. 241.) And, there can be no doubt that in enacting the NLRA Congress intended to exercise that authority. This Court early held that Congress recognized that "some dislocation of property rights may be necessary in order to safeguard [§ 7] right[s]." (*Republic Aviation Corp.* v. *Labor Board*, 324 U.S. 793, 802, n. 8.)

Moreover, the "danger that unrestricted" application of state trespass laws "could easily interfere with federal labor policy" (cf. *Letter Carriers*, 418 U.S. at 271-272) is manifest. *Steelworkers* establishes that picketing in support of a strike at the "entrance to a struck" employer's premises (376 U.S. at 501) "has been fostered by Congress" (*Letter Carriers*, 418 U.S. at 272). While the *Linn* case held that state defamation laws were not superseded insofar as they allowed suits for malicious defamation (as that term is defined in *Linn*), because such actions were "a merely peripheral concern" of the federal labor laws (383 U.S. at 61), the Union's picketing herein was a "weapon of self-help, permitted by federal law [which] formed an integral part of the [union's] effort to achieve its bargaining goals • • •" (*Morton*, 377 U.S. at 259). And, "[c]ollective bargaining with the right to strike at its core, is the essence of the federal scheme." (*Bus Employees*, 374 U.S. at 82.)

The parallel to the Labor Board cases which did not protect malicious defamation, and which justified the preservation of a state cause of action in *Linn* (see 383 U.S. at 61), is to be found in such cases as *Labor Board* v. *Fansteel Mfg. Co.*, 306 U.S. 240, and *Marshall Field Co.* v. *NLRB*, 200 F.2d 375 (C.A. 7) which held, respectively, that a sit-in at an employer's plant and union solicitation in certain areas of the department store were not protected under § 7. Even as preservation of state actions for malicious defamation was held in *Linn* to be consistent with the former set of Board cases, so state action for trespass in a *Fansteel* or *Marshall Field* situation would be consistent with federal law, and in our view, permissible. But the limitation stated in *Letter Carriers*—that preservation of the state cause of action is conditioned on "appropriate substantive limitations" protective of the right "guaranteed by federal law" (418 U.S. at 271)—is also applicable here. To allow state trespass laws, or the threat of their invocation by arrest, to prevent peaceful picketing at the entrance of the struck employer's premises, "would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." (*Morton*, 377 U.S. at 260.)

In sum, petitioner interfered with the exercise of a § 7 right without legally tenable justification. Thus, petitioner violated § 8(a)(1) because "Section 7 guarantees and § 8(a)(1) protects from employer interference the rights of employees to engage in concerted activities, which, as Congress has indicated, H.R. Rep. No. 245, 80th Cong., 1st Sess., 26, include the right to strike." (*Erie Resistor*, 373 U.S. at 233.)

II

Petitioner wholly disregards the circumstances that this case involves picketing in support of a lawful economic strike, rather than communication during an organizing campaign as in *Labor Board* v. *Babcock & Wilcox*, 351 U.S. 105 and *Central Hardware Co.* v. *NLRB*, 407 U.S. 539.[1] Whereas these precedents teach that in an organizing campaign Congress was neutral as to whether concerted activity is permissible at any particular place, the lesson of the cases we cited in part I is that with respect to the economic strike, § 7 affirmatively grants the right to picket at the "entrance to a struck" employer's premises (*Steelworkers*, 376 U.S. at 501). Since this case involves the latter situation, petitioner's reliance on the *Babcock & Wilcox* test, which was developed to govern in organizing campaigns, is misplaced. But we do not wish to leave unanswered petitioner's basic contention that he is entitled to prevail under that test.

(a) *Babcock & Wilcox* establishes that a naked demand by a union engaged in an organizing campaign for access to company property closed to the general public, standing alone, is not sufficient to overcome the right to exclude "strangers" from the property, since, in theory at least, the exclusion may not constitute a § 8(a) (1) "interference" with the organizing effort if "reasonable efforts by the union through other available channels of communication will enable it to reach employees with its message." (351 U.S. at 112.) But *Babcock* does not embrace the op-

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[1] Petitioner properly notes (Pet. Br. 14) that *Republic Aviation* implicates different considerations than the foregoing cases or the present.

posite extreme—that the employer's naked title is always superior to the union's § 7 right. "This is not a problem of always open or closed doors • • •." (*Id.*) What is required is an "accommodation" between the owner's right to exclude and the right to communicate granted by § 7, which works "as little destruction of one as is consistent with the maintenance of the other." (*Id.*) We begin our analysis of the lessons of *Babcock* by comparing the factual situation in that case and this.

First, in contrast to *Babcock*, we are not dealing here with an industrial plant to which the general public is wholly excluded, but with an open area to which the general public, which includes these pickets, is invited. Even if it were assumed by analogy to *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, discussed below, that an invitation to come on property does not entail the total abandonment of the right to exclude persons because they engage in certain activities, it cannot be denied that so much of the property interest which reflects the right of privacy is absent in these circumstances. Moreover, petitioner did not retain fee simple absolute over that portion of its property upon which this picketing took place. For, in leasing a portion of its property to Butler Shoe Store it gave up an easement to Butler safeguarding access for Butler's "employees, agents, customers and invitees." (App. 53.) Thus, even if petitioner retained some property interests of legal significance, these are far less than that of a property owner who has not invited the general public, and who has not given up easements to others to use his land.

Second, the Union's case is far stronger here than in *Babcock* with respect to its inability to reach its intended audience through alternate channels of communication. In *Bab-*

cock the union sought to communicate with a particular group of employees who regularly worked for that employer. In this case, however, the Union sought to communicate with those members of the general public who were planning to shop at the Butler Shoe Store. As the Court of Appeals explained:

> "It is crucial to any analysis to recognize from its outset that the intended audience of the picketing in the instant case included not only the employees of Butler's at the North DeKalb Shopping Center but also the potential customers of Butler's North DeKalb store. This latter audience was only identifiable as part of the citizenry of greater Atlanta until it approached the store, and thus for the picketing to be effective, the location chosen was crucial unless the audience could be known and reached by other means.
>
> "This contrasts with organizational campaigns in which the audience solicited is composed of employees of a particular employer, a limited usually identifiable group, which often can be reached very effectively by means other than personal contact on the employer's private property." (Pet. App. A12-13.)

Since the names of the audience would never be known to the union the mailing of a communication, as the union in *Babcock* had in fact done (see 351 U.S. at 107, n. 1) would have been out of the question (at least short of a mailing to the entire "citizenry of greater Atlanta" (Pet. App. A12)). Petitioner concedes that the union's intended audience here is different than in *Babcock* but argues that this "serves to render other alternatives particularly *appropriate*" (Pet. Br. 20, emphasis in original). But none of the means proposed at Pet. Br. 21 could have matched picketing at the store entrance either in precision of identi-

fication of the chosen audience or in timeliness.[2] While there is a surface plausibility in petitioner's analogy between advertising to the community to patronize the store and the union's message not to patronize, the two situations raise entirely substantially different problems for the person with the message. An advertiser who wishes to induce patronage addresses the entire populace in the hope that even a small percentage will patronize his store or purchase a product, since that percentage is sufficient to justify the economic expense of the advertisement. But the Union was not interested in communicating with the substantial majority of the population of greater Atlanta which was not even contemplating a purchase at Butler's Shoe Store in the North DeKalb shopping center. It was concerned only with reaching that small minority who had identified themselves as potential customers by appearing at or near the store. Moreover, the implication that invitations to patronize are limited to advertisements in the mass media does not accurately describe modern marketing practices which stresses the importance of the "point of sale."[3]

Petitioner argues that the union "could have safely and effectively picketed, if it chose to supplement its picketing

[2] Petitioner refers with approval to the "variety of imaginative techniques" engaged in by the union in *Honolulu Typographical Union No. 37 (Hawaii Press Newspapers)*, 167 NLRB 1030, 1038 (Pet. Br. 21, n. 19). But since those techniques were held to be an illegal secondary boycott by the Board, and the Court of Appeals affirmed, 401 F.2d 952 (C.A.D.C.), they were hardly available to the Union here.

[3] As the court below also said:

> "Hudgens certainly takes an over-broad position in urging that the General Counsel was required to establish that television and radio advertising, direct mailing, and other advertising devices directed at the geographical area from which the Butler's store at North DeKalb Shopping Center draws its its customers would be unavailing. Such alternatives might be part of the General Counsel's burden in a particular organizational situation, *cf.* The Falk Corp., 192 NLRB 716 (1971) *but see* NLRB v. United Aircraft, 324 F. 2d 128, 130 (2d Cir. 1963). However, as substitutes for consumer picketing in a case involving an audience not readily identifiable, and requiring saturation coverage of a large, populous geographical area, such a burden in patently inappropriate. Hudgens' testimony as to the low unit cost and the effectiveness of these advertising methods does not demonstrate that they constitute an acceptable substitute for picketing. That they were useful and utilized by the shopping center to attract customers from the general public does not establish that they were viable alternatives for taking the pickets' message to Butler customers and employees." (Pet. App. A 13.)

at the Butler warehouse, on the public right-of-ways to the entrances to the Center." (Pet. 20.) But the Court of Appeals carefully explained why that alternative was not available to the Union. (See Pet. App. A14-A15.)

In sum, the property owner's interest in exclusion is far slighter here, and the Union's need to communicate on his property is greater than it was in *Babcock*. The Union was therefore entitled to access by § 7. To hold otherwise would transmute the *Babcock* "accommodation" test into an absolute rule of exclusion.

(b) We have met petitioner on his own ground by treating the *Babcock* test as if it called for the "color-matching of cases" (cf. *Reck* v. *Pate*, 367 U.S. 433, 442). But the *Babcock* "accommodation" can be more accurately achieved through the following calculus.

The balance is to be struck, we suggest, by weighing the

financial cost to the property owner of allowing entry against the increased cost to the union of alternate channels of communication. This calculus derives from the decisions in the closely analogous situation of union access to the plant to make time and motion studies in furtherance of its collective bargaining responsibilities. As Judge Kaufman explained in the leading case of *Fafnir Bearing Co.* v. *NLRB*, 362 F.2d 716, 721 (C.A. 2):

> "On the evidence and findings presented in this proceeding, we believe the Board, exercising its expertise and special competence, could properly determine that the Union's need to conduct these tests outweighed the Company's interests in closing its doors to outsiders. Cf. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). Of course, we are not to be understood as saying that if the Company had established that Union-conducted studies would have severely disrupted production, see Note, 17 Stan. L. Rev. 507 (1965), we would not have a significantly different case; but, we shall defer judgment on such a situation until another day." Accord: *General Electric Co.* v. *NLRB*, 414 F.2d 918, 922-923 (C.A. 4); *Waycross Sportswear, Inc.* v. *NLRB*, 403 F.2d 832, 836 (C.A. 5).

Certain potential complications can be excluded at the outset.

First are the loss of the respective rights to exclude or to enter at will. *Babcock* recognized the value of both interests, but because they are mutually irreconcible gave precedence to neither. They are the reason that a balancing test is necessary but they are not part of the test stated. If they were, the outcome in each case would be preordained depending on which was given greater weight.

Second is the employer's interest in insulating himself

from the union's message on the ground that its receipt by its intended audience would be disadvantageous to him. This is the very interest that §§ 7 & 8(a)(1) were enacted to override.

Third, it should be noted that under the *Babcock* test disorderly or obstructive activity, or significant interference with production or employee discipline, are considered too high a cost. These are grounds for exclusion no matter how unreasonable the other channels of communication open to the union may be. Thus, even when it prevails the right of access under § 7 is limited in respect for valid competing considerations.

This leaves on one side the cost to the property owner of regulating the exercise of § 7 rights on his property and, on the union side, the increased cost of reaching its audience away from that site. These costs fairly evaluate the substantial interests at issue. Where entry imposes an insubstantial financial burden on him the owner has not demonstrated a legitimate and substantial justification for exclusion. Where non-access imposes minimal burdens on it the union has failed to demonstrate "interference" with § 7 rights. Where the cost are greater on one side than the other, "accommodation" requires that the party bearing the lesser cost give way.

We would be less than candid if we did not state that the suggested rule advanced here would most probably open company property to unions on many occasions. But this is not because the rule is slanted; it is because in fact, as opposed to theory, the real costs to the union of pursuing alternate channels of communication are normally higher than the real costs to the property owner of allowing entry.

The instant case is instructive. The petitioner attempts to prove added costs entailed in controlling the activities of two individuals with picket signs walking back and forth in front of each of the two entrances to their employer's store to advise of their strike against that employer constitutes a tacit admission that there are no such costs (See App. 130-131, 154-155.) In contrast, while the only cost of the picketing to the Union is a few dollars for placards, the evidence adduced by petitioner shows that a half page ad in the main Atlanta paper, a one minute spot on one television station, and a package of 12 one minute spots on one radio station would cost $1500 a day. (See App. 65, 67, 72.) And, unlike the picketing, these alternatives will not reach every prospective Butler customer. Indeed, most of the expense will be waisted on an audience that never contemplated shopping at Butlers. (See pp. 15-17 *supra.*)

(c) The Chamber of Commerce, as *amicus curiae* here, contends that this case should be decided by applying the test of the First Amendment cases, *Food Employees* v. *Logan Plaza*, 391 U.S. 308, and *Lloyd Corp.* v. *Tanner*, 407 U.S. 551. Petitioner explicitly disavows this approach (Pet. Br. 12-14), and we also believe it is mistaken. Indeed, it seems to us that the Chamber is guilty of the same error for which the Labor Board was taken to task in *Central Hardware*, 407 U.S. at 545-548. Since the Chamber's brief is flawed in its fundamental approach, it merits no reply. But we add for the sake of completeness that the Chamber's reliance on the First Amendment cases is self-defeating. In *Lloyd* the Court read *Logan* as follows:

> "The opinion was carefully phrased to limit its holding to the picketing involved, where the picketing was 'directly related in its purpose to the use to which the shopping center property was being put,' 391 U.S. at 320 n.9, and where the store was located in the center of a large private enclave with the consequence that no other reasonable opportunities for the pickets to convey their message to their intended audience were available." (407 U.S. at 563.)

While "[n]either of these elements was present in" *Lloyd* (*id.* at 564), both are present here.

We have already demonstrated "that no other reasonable opportunity for the pickets to convey their message to their intended audience were available." (See pp. 15-17 *supra.*) It is equally clear that the "directly related" test of *Logan* and *Lloyd* was met here. In distinguishing *Logan Valley*, the Court's opinion in *Lloyd* relied on and explained that test:

> "The handbilling by respondents in the malls of Lloyd Center had no relation to any purpose for which the center was built and being used. It is nevertheless argued by respondents that, since the Center is open to the public, the private owner cannot enforce a restriction against handbilling on the premises. The thrust of this argument is considerably broader than the rationale of Logan Valley. It requires no relationship, direct or indirect, between the purpose of the expressive activity and the business of the shopping center. The message sought to be conveyed by respondents was directed to all members of the public, not soley to patrons of Lloyd Center or of any of its operations. Respondents could have distributed these handbills on any public sidewalk, in any public park, or in any public

building in the city of Portland." (407 U.S. at 564, footnote omitted.)[4]

In sharp contrast to *Lloyd*, the purpose of the expressive activity here could not have had a closer nexus to the business of the shopping center. If Butler's Shoe Store had not been open for business at the North DeKalb Shopping Center, the pickets would have had no occasion for discouraging patronage at that store and would not have made an appearance. And of course, unlike *Lloyd*, but as in *Logan*, the message sought to be conveyed by the union here *was* directed solely to patrons of one of the shopping center's operations.

The argument is made that the *Lloyd* test was not met because the labor dispute which gave rise to the picketing originated in Butler's warehouse rather than in the Butler Shoe Store. (Pet. Br. 17-18, COC Br. 10-11.) But that circumstance is irrelevant, as the Court of Appeals correctly understood:

> "The appropriate focus is on the message sought to be conveyed and its intended audience, not, as the amicus [Chamber of Commerce] urges, on whether the labor dispute in fact was precipitated by something involving the operation of one particular store in the shopping center" (Pet. App. A11.)

If the point of origin of the controversy had been the measure of relatedness, *Lloyd* could have been disposed of by pointing to the fact that no draft board (much less the Vietnam war) was located in the shopping center there.

[4] In the footnote the Court described the "comprehensive" injunction against Lloyd which protected the distribution of literature without "limitation as to type • • • except that it must be 'non-commercial'" (*id.* at n. 11).

Under *Lloyd*, what matters is that the Union is trying to discourage the patronizing of Butler Shoe Stores in the aid of its economic struggle with that company; the geographic origin of that controversy is irrelevant. And of course, it is likewise irrelevant under the NLRA. (Pet. App. A8.) The Chamber grudgingly acknowledges the employees' "right to picket their employer wherever he is located" but seeks to have it so hedged in that it becomes merely "abstract," (see COC Br. 11; cf. *id.* at 18). In Congress' view the "use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining." (*Insurance Agents*, 361 U.S. at 495; see pp. 4-6 *supra*.)

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1974.

No. 74-773

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Petitioner,

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and

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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I. INTRODUCTORY STATEMENT

In its principal brief, Hudgens submitted that, under what was urged to be the controlling test of *N. L. R. B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956), there had not been the requisite showing that "reasonable efforts by the union [to express its message] through other available channels of communication" (351 U. S. at 112) were unavailing. Pet. Br. pp. 18-

21. This fact was dispositive. There was no additional need to inquire as to the "quasi public" nature of Hudgens' North DeKalb Shopping Center or to ascertain whether the respondent Union's picketing had a direct relationship with that property's use. Absent a showing that the Union's desired audience was beyond the reach of available alternatives, regardless of the purpose of its communication or whether the Center was the functional equivalent of a public municipal facility, access by non-employee pickets on private Center property was not required by the National Labor Relations Act. Pet. Br. pp. 10-14, 16-18.

The Board, in response, has apparently abandoned both the *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793 (1945), approach it advocated before the Court of Appeals (Pet. App. pp. A6-A7),[1] as well as its previous acknowledgement that ["c]learly the test to be applied to the case at bar is that set out in *Babcock & Wilcox*" (Pet. App. p. A31).[2] Instead, the

1. The Board did not respond in its brief to Hudgens' arguments (Pet. Br. pp. 14-16) that *Republic Aviation* is inapplicable nor even cite, except for one passing reference (Bd. Br. p. 14), that case. The Union concurred with Hudgens' position. Union Br. p. 13 n. 1.

2. As noted in Hudgens' principal brief (pp. 7, 10), the Board initially relied on *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968), but, following *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972) and *Central Hardware Co.* v. *N. L. R. B.*, 407 U. S. 539 (1972), obtained a remand to reconsider its decision. On remand, the Board's Administrative Law Judge unequivocally declared that *Babcock & Wilcox* controlled (Pet. App. A31), a holding the Board did not disclaim. The Board, in fact, affirmed the Law Judge's decision "for the reasons specifically set forth in *Frank Visceglia and Vincent Visceglia, t/a Peddie Buildings*, 203 NLRB No. 27", *enf. den. N. L. R. B.* v. *Visceglia*, 498 F. 2d 43 (3rd Cir. 1974) (Pet. App. p. A18), where it had held that *Central Hardware* mandated that it apply *Babcock & Wilcox*, not *Logan Valley* (83 LRRM at 1068). At no point did the Board seek to differentiate *Visceglia* on the ground that it involved an industrial park (cf. Bd. Br. p. 35 n. 26) or assert that the *Central Hardware* mandate applied only to instances where there was no "congruence between Section 7 and constitutional rights" (cf. Bd. Br. p. 18 n. 12). As noted before (Pet. Br. p. 12 n. 13), these contentions are impermissible *post hoc* rationalizations of Board appellate counsel.

Board now asserts that neither *Babcock & Wilcox* or *Central Hardware Co.* v. *N. L. R. B.*, 407 U. S. 539 (1972), have any application to the instant case. Bd. Br. pp. 16-17, 26 n. 20. Where, as alleged to be the instant case, private property has assumed "to some significant degree the functional attributes of public property devoted to public use" (Bd. Br. pp. 10, 17-18) the Board argues the applicable criteria are the constitutional principles formulated in *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968), and *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972), and that such "*Logan Valley-Lloyd* criteria were satisfied here—*i.e.*, the picketing was directly related to the use of the shopping center, and no other reasonable opportunities for conveying the pickets' message to its intended audience were available" (Bd. Br. pp. 18-19). Thus, in contrast to the single standard of *Babcock & Wilcox*, the Board advocates a tripartite test: (1) the property in question must be analyzed to determine whether it has "acquired the characteristics of a public municipal facility" (Bd. Br. p. 21, quoting *Central Hardware*, 407 U. S. at 547)—if it has not, then *Babcock & Wilcox* is still controlling; (2) where there is such functional equivalence, then the proposed activity must be found to be directly related to the use to which the shopping center is being put (Bd. Br. pp. 11, 18) and (3) apparently in addition to the criterion of direct relationship (Bd. Br. p. 19, n. 13), there must be a demonstrated absence of available alternatives, albeit a less "stringent" showing than that required by *Babcock & Wilcox, i.e.*, "[o]n quasi public property, the relevant inquiry is not whether a consumer appeal may be made by means other than picketing and handbilling, but whether there are purely public locations where that activity can be carried on effectively without access to the quasi public property" (Bd. Br. p. 13).

The Union has taken a totally different tack, categorizing the Board's reliance on *Logan Valley-Lloyd* as "mistaken". Union Br. p. 20. In agreement with Hudgens, the Union asserts that, in a case arising under the Act, a constitutional

approach is precluded by *Central Hardware*. There is disagreement, however, as to the approach that should be utilized. Disavowing the *Babcock & Wilcox* test, since that standard "was developed to govern in organizing campaigns" (Union Br. p. 13), the Union proposes a rule that would grant a union the absolute right to engage in peaceful primary picketing on private property; such picketing "cannot be set aside on the theory that other alternatives . . . are a sufficient substitute" (Union Br. p. 7). The Union would thus find in every instance, apart from organizational campaigns, that the Act permits non-employee access to private property. Only in organizing situations would a union be obligated to show the absence of available alternatives.

As discussed hereafter, both the Board and the Union err in their contentions. There must be due regard for both a union's statutorily protected right to communicate and the "long-settled rights of private property protected by the Fifth and Fourteenth Amendments" (*Central Hardware*, 407 U. S. at 547). The Union's absolute rule, however, would *always* open private property to non-organizational primary picketing. The Board, conversely, would employ a multi-faceted test with different results dependent on whether the forum selected is "quasi public" property, or there is a message directly related to the use of that property, or there are available "purely public locations" where the desired activities could also be effectively conducted. *Babcock & Wilcox*, however, as *Central Hardware* teaches, provides a much simpler "guiding principle for adjusting conflicts between § 7 rights and property rights: . . . the allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 rights." 407 U. S. at 544-545. Only where "a union has no other means at its disposal to communicate . . . other than to use the employer's property", does the Act mandate access. *Id.* at 548 (dissenting opinion). As also shown below, the Union here did not meet this test.

II. ARGUMENT

A. The Board's Erroneous Approach

1. The Board would disregard the statutory criteria of *Babcock & Wilcox* wherever "the property involved is the functional equivalent of a business block". In such a case the Board argues that "it is reasonable and proper . . . to apply the criteria mandated by the Constitution". Bd. Br. p. 17. There are fundamental defects in this position: it misconstrues *Central Hardware;* it would lead to an undesirable administration of the Act; and even assuming *arguendo* it were a correct principle, the DeKalb Center has not assumed "to some significant degree the functional attributes of public property devoted to public use."

As discussed in Hudgens' principal brief (pp. 12-14), prior to its present position, the Board acknowledged that *Central Hardware* precluded the application of constitutional criteria to *all* statutory cases regardless of the nature of the property involved. For example, in holding that, absent compliance with *Babcock & Wilcox*, the owner of a "small shopping center" could forbid union picketing thereon, the Board declared that "[i]rrespective of what the Board may have held prior to . . . *Central Hardware*", citing *inter alia* its initial decision in this case, "the law is now settled that *Logan Valley* decided *only* constitutional issues, not Section 7 rights . . ." (emphasis the Board's).[3]

3. *S. E. Nichols of Ohio, Inc.*, 200 NLRB 1130, 1131 (1972), which involved picketing and handbilling in front of the entrance to the largest (60,000 to 75,000 square feet) of five contiguous stores in a shopping center complex containing a common parking lot maintained by the lessee of that store. The Board would distinguish this case, as "purely private property", relying on its Law Judge's view that the *Nichols* center was "more akin to the single company and single parking lot situation". Bd. Br. p. 21 n. 14, citing Pet. App. A26 n. 1. This distinction, however, is one that is undiscernible

(Footnote continued on next page)

This is the correct reading of *Central Hardware*. That decision did not hold, as the Board now urges, that there should be one rule for "quasi public" property and another for "purely private property". Rather, as both the majority and dissenting opinions in *Centarl Hardware* emphasize, *Logan Valley* was inapplicable to that dispute, and is similarly irrelevant here, because, while *Logan Valley* involved "labor picketing, the decision rests on constitutional grounds; it is not a § 7 case. . . . [*Logan Valley*] does not purport to interpret the National Labor Relations Act . . .". 407 U. S. at 545; *id.* at 548 (dissenting opinion). The Board's argument in *Central Hardware*, as in the present case, was that "the character and use of Central's parking lots distinguished the case from . . . *Babcock & Wilcox* . . . and brought it within the principle of . . . *Logan Valley*." *Id.* at 542. In rejecting this argument, the Court emphasized not only the different factual setting of *Logan Valley* and *Central Hardware*, but also the different legal framework of the cases. It is this latter distinction which the Board now ignores.

Differentiating *Central Hardware* on the basis of the property involved would also lead to anomalous results. The owner of a large single standing store set off from public highways and surrounded by parking facilities for 350 automobiles such as Central Hardware, or of a small shopping center as in *S. E. Nichols*, or of other multi-enterprise retail establishments such as discount houses or large department stores, would, where the standards of *Babcock & Wilcox* had not been met, be immunized from picketing, handbilling or non-employee union solicitation. Conversely, the owner of a large shopping center

(Footnote continued)
from the *Nichols* opinion and in conflict with the pre-*Lloyd* decisions of various state courts which did not treat similar locales any different from Logan Valley Plaza. See, *e.g.*, *Lada* v. *Barbers Local 149*, 71 LRRM 3179 (Pa., Erie Cty. Ct. C. P. 1969), and *My's Restaurant, Inc.* v. *Hotel, Motel, Restaurant and Bartender Union, Local 571*, 76 LRRM 2393 (Wis. Cir. Ct. 1970). It is also a distinction which is manifestly contrary to *Lloyd's* repudiation of different standards predicated on the size or situs of retail establishments.

would, because of "being large or clustered with other stores in a modern shopping center" (*Lloyd*, 407 U. S. at 569), possess entirely different property rights. This is the very definitional dichotomy against which *Lloyd* admonished: "In terms of being open to the public, there are differences only of degree—not of principle—between a free-standing store and one located in a shopping center, between a small store and a large one, between a single one with some malls and open areas designed to attract customers and Lloyd Center with its elaborate malls and interior landscaping." *Id.* at 565-566.

Even accepting, however, the Board's contention (Bd. Br. pp. 19-21) that there are substantial similarities between the DeKalb and Lloyd Centers,[4] the Board does not recognize that *Lloyd* and *Central Hardware* substantially modified the concept of functional equivalence. As the Seventh Circuit recently observed, those decisions carefully drew a distinction "between classic 'company towns' and such 'modern economic phenomenon' . . . as a shopping center."*Illinois Migrant Council* v. *Campbell Soup Company*, 519 F. 2d 391, 396 (7th Cir. 1975). Where, as in this case, there is "property, otherwise private, upon which the public is invited for certain limited and designated purposes" (*Id.* at 595), *Marsh* v. *Alabama*, 326 U. S. 501 (1946), the "genesis" of *Logan Valley* (*Central Hardware*, 407 U. S. at 545), is inapplicable. "[S]uch property cannot be thought of as a 'company town'." *Illinois Migrant Council*, 519 F. 2d

4. As noted in Hudgens' principal brief (p. 4 n. 3; p. 5 n. 5), the DeKalb Center is operated solely by Hudgens and is clearly marked and maintained as private property. App. pp. 111-112, 115-116, 120-121. Like other retail and service enterprises, Hudgens must perform various functions, such as security, parking lot regulation, sanitation and maintenance, which a municipality may perform for a home-owner; Hudgens, however, receives no special consideration and is subject to the same requirements as any other private property owner. App. pp. 150-154. Moreover, in contrast to *Lloyd*, in the instant case there has also been no municipal vacating of streets or intertwining of the Center with public property, or use of the Center for a variety of public functions, or employment of security guards with full police powers. See 407 U. S. at 554; *id.* at 575-78, 578-79 (dissenting opinion).

at 395. The factors isolated by the Board[5]—the size of the Center and situs of the store in an enclosed central building separated by parking facilities from public streets—do not automatically convert a shopping center into "a public municipal facility". Here, as in *Lloyd*, "there has been no such dedication of [Hudgens'] privately owned and operated shopping center to public use" as to entitle the Union to access. 407 U. S. at 570. In neither case has the Center taken on "*all* of the attributes of a state-created municipality . . . performing the *full* spectrum of municipal powers and [standing] in the shoes of the State." *Id.* at 569 (emphasis added.)

2. The Board asserts that a failure to apply constitutional criteria "would lead to the anomaly that employees could obtain greater protection for their right to strike and peacefully picket by court suits than they could by invoking the procedures of the National Labor Relations Act. . . ." Bd. Br. p. 17. This argument presupposes, first, that the Board has been divested of exclusive jurisdiction—a question left undecided by this Court in *Logan Valley* and *Taggart* v. *Weinacker's*, 397 U. S. 223 (1970), and resolved in favor of preemption by the Georgia Supreme Court in the companion Hudgens case pending before the Court on petition for certiorari in No. 74-1032. Second, even if state courts are not preempted, and potential conflict is a viable possibility, this may simply be the price to pay in order to redress demonstrable wrongs and avoid a no-law area. See *Taggart*, 397 U. S. at 227-228. (Burger, C. J., concurring); Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1361-63 (1972). Finally, again assuming concurrent jurisdiction, there is no assurance that "greater protec-

5. Bd. Br. pp. 10, 19-21. The Union (Br. p. 14) would distinguish *Babcock & Wilcox* on the grounds that (1) in this case there is "an open area to which the general public . . . is invited"—the "open to the public" argument rejected in *Central Hardware* (407 U. S. at 547); and (2) Hudgens' grant of "easements to . . . [tenants'] employees, agents, customers and invitees" to enter upon the Center—the "open-ended invitation" argument rejected in *Lloyd* (407 U. S. at 565).

tion" will result from a court action in contrast to a Section 7 proceeding. While there may arguably be a "more stringent" showing of inadequate alternatives required under the statutory criteria (Bd. Br. p. 18, n. 12),[6] that test does not necessitate, as does the constitutional standard, any finding that picketing be "directly related in its purpose to the use to which the shopping center property is being put." *Lloyd*, 407 U. S. at 563, quoting *Logan Valley*, 391 U. S. at 320 n. 9.[7] The Act is thus both "broader" and "narrower" than the First Amendment and may provide more, as well as less, protection. *Central Hardware*, 407 U. S. at 548-49 (dissenting opinion); see also Pet. Br. pp. 12-14.

6. Nothing in *Lloyd* suggests that the alternative test of that case is, in fact, less stringent than that of *Babcock & Wilcox* or precludes access only where "there are *purely public locations* [available] where . . . [the desired] activity can be carried on effectively without access to quasi public property." Bd. Br. pp. 31-32 (emphasis added). Indeed, this Court's articulation of the constitutional alternative test, *i.e.*, that access is permitted only where the pickets would otherwise be "deprived of *all reasonable opportunity* to convey their message" (*Lloyd*, 407 U. S. at 566; emphasis added), strongly suggests that it does not differ from the statutory rule.

7. Hudgens has not urged a relationship test because of its belief that *Babcock & Wilcox* is controlling. It does submit, however, assuming such a criterion, that the Court of Appeals' interpretation thereof, advocated by both the Board (Br. pp. 21-24) and Union (Br. pp. 21-23), is erroneous. Primary picketing is necessarily "addressed to the labor policies of the [picketed store]" (Bd. Br. p. 21); to find that this relationship constitutes a sufficient nexus would render the relationship test a nullity in any union picketing case. If geographic origin is irrelevant, and all that is needed is an attempt by the pickets to discourage patronage of the struck establishment (Union Br. p. 23), then any primary picketing would qualify— "[t]he primary strike . . . is aimed at applying economic pressure by halting day-to-day operations of the struck employer." *United Steelworkers* v. *N. L. R. B.*, 376 U. S. 492, 499 (1964). A meaningful relationship test must, therefore, focus upon whether there is a labor dispute at the situs of the picketing. See Pet. Br. pp. 16-18. By arguing that the relationship criterion is satisfied merely because potential Butler customers come "within the scope of the broad invitation issued by Hudgens to the public . . ." (Bd. Br. p. 11), the "Respondents' argument . . . misapprehends the scope of the invitation extended to the public." *Lloyd*, 407 U. S. at 564.

B. The Union's Erroneous Approach

1. Although not advocating the Board's "quasi public"-"purely private" dichotomy, the Union proposes a similarly unsound distinction. It proposes one rule for picketing, under which the existence of alternative forums would be irrelevant, and another test for other Section 7 activities, such as organizational campaigns, under which the *Babcock & Wilcox* alternative standard continues to be determinative. This approach presumes that because *United Steelworkers* v. *N. L. R. B.*, 376 U. S. 492 (1964), sanctioned "the right to picket at the 'entrance to a struck' employer's premises", *any* limitation thereupon is impermissible. Union Br. pp. 7, 12. This basic assumption, however, is wrong. The right to picket, even on public property, is not absolute. Even peaceful picketing has repeatedly been regulated by either the Act, state law or other limitations imposed "to prevent interference with the use to which the property is ordinarily put . . . [or] the normal use of the public property by other members of the public with an equal right of access to it." *Logan Valley*, 391 U. S. at 320-21.

Picketing, for example, which has a purpose either expressly or impliedly forbidden by the Act,[8] or is otherwise illegally motivated,[9] may be forbidden. Similarly, picketing which involves improper, albeit peaceful, tactics,[10] or is in breach of valid contractual limitations,[11] may also be barred. *Steelworkers,*

8. See, *e.g.*, Sections 8(b)(4), 8(b)(6) and 8(b)(7) of the Act; *H. M. Newman*, 85 NLRB 725 1946) (a primary work stoppage to cause an unlawful discharge violates the Act); and *ABC Prestress & Concrete*. 201 NLRB 820 (1973) (a primary strike to force an employer to grant an illegal wage increase is unprotected by the Act).

9. See, *e.g.*, *Plumbers Local 10* v. *Graham Bros.*, 345 U. S. 192 (1953).

10. See, *e.g.*, *N. L. R. B.* v. *Fansteel Mfg. Co.*, 306 U. S. 240 (1939).

11. See, *e.g.*, *Boys Market, Inc.* v. *Retail Clerks Local 770*, 398 U. S. 235 (1970).

in short, does not stand for the unrestricted right of a union to picket at the entrance to a struck employer's premises. The holding in that case is a limited one; that, particularly where "there was no other place where the union could have brought home . . . its dispute", the "location of the picketing is an important but not decisive factor" in determining whether common situs picketing is precluded by Section 8(b)(4) of the Act. 376 U. S. at 499-500. As the Court was careful to note, this conclusion does not imply the picketing "is in all respects legal but only that it is not forbidden by § 8(b)(4); it would escape neither the provisions of the federal law nor the local if violative thereof." 376 U. S. at 502.

The Union incorrectly claims that "Petitioner's asserted justification" for its exclusion of the pickets was solely the Georgia Criminal Trespass Law. Union Br. pp. 8-12. Hudgens' position is predicated, instead, on a much more fundamental concept: "the long-settled rights of private property protected by the Fifth and Fourteenth Amendment" (*Central Hardware*, 407 U. S. at 547). Trespass laws, of course, provide one means whereby a property owner can effectuate property rights. See, *e.g.*, *Taggart*, 397 U. S. at 227 (Burger, C. J., concurring); *People* v. *Goduto*, 21 Ill. 2d 605, 174 N. E. 2d 385, *cert. den.* 368 U. S. 927 (1961). Additionally, the Act affords protection by requiring that employee rights granted therein must be accommodated with property rights "with as little destruction of one as is consistent with the maintenance of the other." *Babcock & Wilcox*, 351 U. S. at 112. Neither Section 7 or property rights, therefore, are absolute. An employer has no more power to create a *cordon sanitaire* to always insulate private property from peaceful primary picketing than he would have to prevent all non-employee union organizational activities thereon. Where reasonable attempts to reach a union's desired audience are shown to be ineffective—*e.g.*, if Butler here had an operation at the Center whose employees or customers truly

could not be reached through other channels of communication—then both Hudgens and Butler's property rights would have to yield. *Id.* at 113. In the converse situation, as in this case, where there are reasonable alternatives to picketing in front of the struck premises, the Union was required to utilize those alternatives. There is, as this Court has stated in other contexts, no unfettered right by a union or anyone else to propagandize one's views whenever and however and wherever one pleases. *Adderley* v. *Florida,* 385 U. S. 39, 48 (1966); *N. L. R. B.* v. *United Steelworkers,* 357 U. S. 357, 363-364 (1958). This principle is as applicable to picketing as it is to other forms of expression.

2. The Union's proposed distinction between "organizing campaign" activities and picketing, with different access criteria dependent on which conduct is involved notwithstanding that the situs may be the same, would also lead to illogical results. There is no clear demarcation between an organizational campaign and picketing; picketing may have an organizational or recognitional objective. Unions frequently attempt through picketing to organize "from the top as distinguished from the accepted organizational technique of attempting to persuade . . . by use of handbills, letters, meetings . . ." I. Legis. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, p. 471. Recognitional picketing, moreover, is an organizational technique fraught with potential abuse (see Section 8(b)(7) of the Act; Meltzer, *Organizational Picketing and the NLRB: Five On A Seesaw*, 30 U. Chi. L. Rev. 78 (1962)) and, as a result, is a less preferred route than the Act's election machinery. *Id.* at 83; see also *Linden Lumber* v. *N. L. R. B.*, 419 U. S. 301, 304, 306 (1974). The Union's proposed rule, however, would permit a non-employee unrestricted access to private property to engage in coercive recognitional picketing while concurrently denying the same individual access, where the *Babcock & Wilcox* test had not been met, to solicit authorization cards or distribute literature for a Board representation election. It

would similarly always permit picketing on private property, as here, to enforce bargaining demands at a distant location while often denying entry to those seeking to organize employees working at the struck site. These incongruous results are hardly compatible with the Congressional desire "to fashion a coherent national labor policy." *N. L. R. B.* v. *Drivers Local Union No. 639,* 362 U. S. 274, 292 (1960).

C. The Babcock & Wilcox Test Was Not Met in This Case

1. The Board does not attempt to demonstrate that the *Babcock & Wilcox* reasonable alternative test has been met in this case. Instead, its position is that "the Union did not have the burden of establishing that it could not have reached the customers of Butler's North DeKalb store by newspaper, television, and radio advertising, direct mailing, or other advertising devices . . . [e]ven if these methods were economical and effective in attracting customers to the shopping center for commercial purposes." Bd. Br. p. 30. *Babcock & Wilcox*, however, does impose the burden on a union to establish a justification for access by showing that reasonable attempts to utilize other alternatives were ineffective. See, *e.g., N. L. R. B.* v. *Kutsher's Hotel and County Club, Inc.*, 427 F. 2d 200, 202 (2nd Cir. 1970); *May Department Stores Company* v. *N. L. R. B.*, 316 F. 2d 797, 800 (6th Cir. 1963); and *S. E. Nichols of Ohio*, 200 NLRB at 1132. This burden cannot be transferred, as already shown, merely because the employer is "clustered with other stores in a modern shopping center. *Lloyd*, 407 at 469; cf. Bd. Br. pp. 30-33.

2. Both the Board (Br. p. 30 n. 23) and the Union (Br. pp. 14-16) also assert, without analysis, that the effectiveness of various methods in attracting customers to the Center would not be effective in keeping the same customers away. Unrebutted expert testimony in this case is to the contrary: such methods would have been both more effective and less expensive than

picketing. App. pp. 177-179. The Union's intended audience was not, as its brief (p. 16) claims, only "that small minority who had identified themselves as potential customers at or near the [Butler Center] store"; it was all employees and potential customers of any of the nine Butler retail stores in the greater Atlanta area. Picketing, in fact, took place at all of these locations as well as at the Butler warehouse where the Union's dispute arose. Pet. App. A2-A3. In these circumstances there is no legitimate reason why the Union could not, as in the admitted case of an advertiser who wishes to induce patronage, "address the entire population in the hope that even a small percentage will [not] patronize [Butler] . . . since that percentage is sufficient to justify the economic expense of the advertisement." Union Br. p. 16.

The alternative means suggested by Hudgens—newspapers, radio, television, picketing and/or handbilling on the public right-of-ways to the Center,[12] and so on—are not unprecedented. In seeking to reach a far more limited audience of employees, even in large metropolitan areas like Milwaukee and Chicago, newspapers, radio and television have been recognized as feasible channels of communication. *The Falk Corporation*, 192 NLRB

12. The Board's contention (Br. pp. 28-29) that the alternative of picketing on the Center's adjacent right-of-ways is not reasonable because of difficulty in reading the picket signs or potential danger to the pickets disregards the record evidence that each entrance to the Center contains a right-of-way sufficient for pickets and requires either a complete stop or a slow turn after a stoplight. App. pp. 105-107, 144-146. Similarly, the contention (Bd. Br. p. 29) that picketing at the entrances to the Center would enmesh neutrals is belied by the Board's own well-established *Sailors' Union of the Pacific* (*Moore Dry Dock Co.*), 92 NLRB 547 (1950), rules regulating common situs picketing. See Pet. Br. p. 20 n. 17. Indeed, the Board recently upheld picketing at the entrance to a multi-enterprise, multi-story office building as "reasonably close to the situs of the dispute", although directed at a tenant primarily located on the fourth floor thereof, stating that "[p]icketing outside the primary's place of business at entrances normally used by the primary's employees, customers and suppliers has always been reasonable under the *Moore Dry Dock* standards." *Wire Service Guild, Local 222*, 218 NLRB No. 186 (July 3, 1975).

716, 721 (1971); *Monogram Models, Inc.*, 192 NLRB 705, 706 n. 5 (1971). No reason has been proffered, either at the hearing, in the opinions below or in the Respondents' briefs, to explain why "Hudgens' testimony as to the low unit cost and the effectiveness of these advertising methods does not demonstrate that they constitute an acceptable substitute for picketing . . . [and] viable alternatives for taking the pickets' message to Butler customers and employees." Pet. App. p. 13.[13] Merely asserting that untried alternatives would be ineffective does not meet the *Babcock* and *Wilcox* burden, particularly where the record reveals "evidence of accessibility had there been reasonable Union efforts to this end." *N. L. R. B.* v. *Kutcher's Hotel and Country Club, Inc.*, 427 F. 2d at 202.

3. At perhaps the crux of the Board and the Union's position is the belief that other alternatives to picketing must *ipso facto* be deemed ineffective, that they simply do not match "picketing at the store entrance either in precision of identification or timeliness." Union Br. pp. 15-16; Bd. Br. pp. 27-28. Even accepting the thesis that picketing constitutes a different type of communicative activity, which evokes a different response than the spoken or printed word, there is, as already shown, no guarantee in the Act that a union have an unrestricted right to picket on private property in order to communicate its message. A union may only resort to picketing where its conduct does not unduly intrude

13. The Union (Br. pp. 17-20) does contend that if a novel balancing calculus, "weighing the financial cost to the property owner of allowing entry against the increased cost to the Union of alternative channels of communications," were utilized, access would be warranted here as on "many occasions." The Union fails to consider, in formulating this calculus, the intangible cost of the "volatile influence on certain audiences" of picketing, and the tangible fact that it "involves customer annoyance and a consequent loss of sales for management" (Gould, *Union Organizational Rights and the Concept of "Quasi-Public" Property*, 49 Minn. L. Rev. 505, 507-08 (1965)) as well as other expenses (App. pp. 130-31, 154-57). In any event, the test is not one of relative cost or convenience but, rather, whether *reasonable* efforts, even if more costly or less convenient, could reach the desired audience. See Pet. Br. pp. 18-19.

upon other competing interests also entitled to recognition. And one of those interests, granted by the same authority that preserves the right to picket, is the right of private property recognized in the Act and protected by the Constitution. Where, as here, other reasonable alternatives are available, those property rights need not yield even in the name of picketing.

III. CONCLUSION

For the reasons stated herein, as well as those set forth in Hudgens' principal brief, Petitioner respectfully prays that this Court reverse the judgment of the Court of Appeals and remand this case to that Court with instructions to deny enforcement to the Board's order.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-773

SCOTT HUDGENS, AN INDIVIDUAL,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,
Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-773

SCOTT HUDGENS, AN INDIVIDUAL,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,
Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONER.

INTEREST OF THE AMICUS.*

1. The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in

*There have been lodged with the Clerk of the Court the written consents of the parties to the captioned proceeding to the filing of this *amicus brief*.

excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

2. The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.**

The question presented in the instant case is a matter of continuing importance to the Chamber. Briefly stated, that question is: under what circumstances must the constitutional right of private property yield to allow picketing when the underlying labor dispute does not originate on this property and does not concern the business operations or labor relations at that property of the property owner or any tenant.

This is an issue which is of particular concern to the Chamber and its members since any rule which may emerge will necessarily exert an enormous impact on those members' rights and, potentially, on their manner of doing business.

The Chamber is, by virtue of its interest in this area, in a position to urge views upon this Court which neither party has argued.

**E.g., *Connell Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100, etc.* No. 73-1256; *N.L.R.B.* v. *Textron, Inc.*, ... U.S. ....., 85 LRRM 2945 (1974); *Geduldig* v. *Aiello, et al.*, ... U.S. ....., 8 F.E.P. Cases 97 (1974); *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971); *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213, 34 L. Ed. 2d 422 (1972); *Boy's Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970); *Sears Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U.S. 655 (1970); *Super Tire Engineering Co., et al.* v. *McCorkle, et al.*, ... U.S. ....., 85 LRRM 2913 (April, 1974); *N.L.R.B.* v. *Frank Visceglia and Vincent Visceglia t/a Peddie Buildings*, ... F. 2d ....., 86 LRRM 2541 (CA 3, 1974); *Scott Hudgens* v. *N.L.R.B.*, ... F. 2d ....., No. 73-3264 (CA 5, 1974). *Scott Hudgens* v. *Local 315 Retail and Wholesale Department Store Union*, 74-1032.

With respect to the wide-ranging impact of any decision which may be rendered here on the rights of the Chamber's members, it should be noted that shopping centers can be of practically any size ranging from a collection of large national retail operations to local, neighborhood centers with but a few small independent stores. In fact, the characteristics of a shopping center do not materially differ from other types of retail enterprises, such as discount houses or large department stores, which are not generally regarded as "shopping centers". The interest of the Chamber is thus predicated on the substantial consequences that any decision here may have for *all* methods of retail operation. Indeed the Chamber's concern extends beyond retail operations to even nonretail property such as was involved in *Peddie Buildings, supra*. The Chamber is also concerned about the impact on its members' legitimate business interests of the adoption of a requirement, sought by the Board, that by opening their property to business invitees they thereby necessarily become constitutionally obligated to permit their property to become a battlefield for a variety of controversial competing uses to the detriment of their businesses, without regard for the preservation of their own rights or the actual communication needs of others.

SUMMARY OF THE ARGUMENT.

This case presents a recurring question of significance to employers generally, due to the proliferation of shopping centers and the attempted use of this property by labor organizations and others for protest activities. Here this Court is asked to define when private property rights must yield and permit the intrusion of expressive or protest activity where the underlying labor dispute does not originate on the property and does not concern the business operations or labor relations of any facility at this property. Thus, while the pickets here sought access to Hudgens' center, a privately owned shopping center, to picket a retail outlet of Hudgens' tenant, Butler Shoe Co., the underlying

labor dispute originated at and concerned only the labor relations of Butler's nonretail warehouse which was *not* located on Hudgens' center.

Therefore, it may be said that the purpose of the intended picketing was but *indirectly* related to the business of the center. This Court has recognized the existence of such an indirect relationship in *Lloyd Corp.* v. *Tanner,* 407 U.S. at 564 (1972).

This case, then, concerns the accommodation to be made between the rights of property and expression when the purpose of the expressive activity is not directly related to the business of the private property.

This Court has considered the accommodation between these competing rights when the labor dispute originated on the shopping center and was, therefore, directly related to the business of the center. (*Logan Valley,* 390 U.S. 308, 1968.) This Court has also prohibited expressive activity from taking place on a private shopping center when the purpose of this activity was wholly unrelated to the center's business. (*Lloyd Corp.* v. *Tanner, supra.*)

The Chamber submits that a proper accommodation of the competing rights here in question requires initially a distinction between expressive activity that is directly related to the property's use and that which is indirectly related. In the former situation where the dispute originates on the property to be subjected to the protest, the property owner or his tenants can forestall or curtail this dispute by changing their mode of operation. In the latter situation, as here, where the dispute originates and is centered elsewhere, neither the property owner nor any tenant who will be subjected to the protest activity can effect the scope or duration of this activity by altering methods of operation. While the Chamber believes that in either situation expressive activity should be permitted to encroach on to private property only if alternative public forums are lacking, the Chamber submits that the proof concerning the absence of

alternative forums must be greater and more compelling in the situation where the purpose of the expressive activity is but indirectly related to the property's business. That is, since the users of the private property to be subjected to protest activity indirectly related to the property's purpose have no control over the duration or scope of this activity (except by excluding the protesters) there should be no occasion to open this property to such activity absent a conclusive demonstration of a compelling need due to the lack of alternative public forums.

Indeed, due to the particularly intimidatory effect of picketing, this Court should require strict and compelling proof by those who desire to picket on private property that alternative forums or alternative methods of communication are not adequate. Only after such a strict demonstration should private property be opened to consumer picketing, particularly where, as here, the underlying labor dispute did not originate on this property and was not directly related to the property's business.

The Chamber believes that this standard or rule appropriately balances the interests at issue in this proceeding and urges its adoption by this Court. An analysis of the record below utilizing the standard proposed by the Chamber demonstrates that the property owner, Hudgens, lawfully excluded the pickets from his property since these pickets did not demonstrate the lack of alternative public forums. The court below failed to distinguish between expressive activity that was directly related to the business of the property and activity that was but indirectly related and, accordingly, reached the decision that did not give due regard to private property rights. In addition, the court below erred by failing to recognize the intimidatory effect of picketing and that alternatives to direct picketing on private property do exist and should be employed especially where the purpose of the protest is indirectly related to the property's business.

ARGUMENT.

A. The Expressive Activity in This Cause Was But Indirectly Related to the Property's Business.

The Employer, Scott Hudgens, owns a sixty store retail shopping center which draws its customers from the metropolitan Atlanta area. This center consists of a single large building constructed around an enclosed mall and surrounded by a parking lot. Five driveway entrances lead into this parking lot. Hudgens has an abiding interest in the commercial success of the center's tenants since its rentals are based upon their gross sales. Among Hudgens' tenants is a retail outlet of Butler Shoe Company.

In January, 1971, nonretail employees of Butler employed at its warehouse that is not located on Hudgens' property engaged in a strike protesting the warehouse's failure to reach agreement on a contract with a union. In order to support this strike, the Union determined to picket Butler's retail outlets as well as its warehouse.[1] Accordingly, four warehouse employees arrived on Hudgens' property intending to picket at the entrances to Butler's retail outlet located in the center's mall. After a conversation with Hudgens' agent, the pickets left the center and filed unfair labor practice charges with the Labor Board.

As is apparent, while the Union was attempting to picket Butler's retail facility on the center's private property, the labor dispute did not originate on this property since it did not concern the manner in which Butler was operating its retail outlet at the center. Rather, the dispute originated at the Butler warehouse, concerned only those operations, and did not concern the labor relations of any Butler retail facility. Therefore, it may be said that the purpose of the intended picketing was but indirectly

1/ The Union picketed eight of Butler's retail locations in the Atlanta metropolitan area in an effort to reach the buying public of Greater Atlanta, and intended to picket Butler's retail operations on Hudgens Center.

related to the business of the center. This Court has recognized the existence of such an indirect relationship in *Lloyd Corp.* v. *Tanner, supra.*[2] Where this relationship exists, neither the center's owner nor any of his tenants can forestall or curtail picketing by altering their operational methods.

B. Expressive Activity Indirectly Related to Private Property's Business Should Be Allowed on This Property Only Upon Compelling Demonstration That Alternative Public Forums Are Absent.

1. A Test Derived from Logan and Lloyd Supports This Contention.

The specific issue is whether Hudgens violated the Labor Act (Sections 7 and 8(a)(1)) by forestalling this picketing. A broader and more significant issue concerns the accommodation to be made between property and expressive rights when the purpose of expressive activity is but indirectly related to the business of the private property involved. That is, in such a situation, when must property rights yield and permit expressive activity to occur on private property.

2. Moreover, in *Logan,* this Court stated at footnote 9, page 613:

> "The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which *that particular market was being operated.* We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was *not thus directly related* in its purpose to the use to which the shopping center property was being put." (emphasis added)

This Court's language "thus directly related" can only refer to the situation in *Logan* where the picketing was in regard to the manner in which a facility was being operated on the property where the picketing occurred. This view is endorsed by *Lloyd* which recognized that an indirect relationship may exist at a point in the decision immediately following a discussion of the direct relationship that existed in *Logan.* (page 564). It follows that this Court has distinguished between a direct and an indirect relationship and that the situation in this case involves at best the indirect relationship recognized by *Lloyd.*

This Court has reviewed related issues in *Logan*[3] and *Lloyd*. A consideration of these decisions is necessary in order to ascertain the circumstances that require property rights to yield to expressive rights. While a determination of these circumstances will not resolve the broad issue here, this determination is necessary to point the way to the answer. In *Logan* this Court found a direct relationship between the purpose of the protest activity and the business of the shopping center because the picketing was in regard to the manner in which a facility was being operated—that is, without a union—on the center's property where the picketing occurred.[4] This Court then considered the balance to be struck between property and expressive rights when such a direct relationship is found to exist. In *Lloyd*, by contrast, the propaganda activity conducted in the private shopping center was wholly unrelated to any purpose for which this property was being used. (407 U.S. at 564.) That is, the purpose of the expressive or protest activity in *Lloyd*—an anti-war protest—did not concern the manner in which any tenant of the center operated his business on the center's property or elsewhere. Consequently, this Court prohibited the exercise of this expressive activity on Lloyd's private center. This Court apparently recognized that while the picketed employer in *Logan* could in some measure forestall or curtail the picketing by altering his operational methods at the center, neither the center owner nor his tenants in *Lloyd* had control over the duration or extent of the protest; changing their business methods at any location where they operated would have no impact upon the anti-war protest.

While the instant case has factual parallels with *Lloyd*, rather than with *Logan*, it presents a situation different from each of these prior cases.[5] Thus, the dispute here, like that in *Lloyd*,

3. *Amalgamated Food Employees' Union, Local 590* v. *Logan Valley Plaza, Inc.*, 390 U.S. 308 (1968).

4. 391 U.S. at 320 footnote 9, and at 326. *Lloyd* reaffirmed this view. 407 U.S. at pages 552, 553, 560-561.

5. The Chamber believes that in its *Lloyd* decision, this Court addressed itself to the type of variables present in the instant cause. While *Lloyd* is a Fourteenth Amendment case, it therefore applies by analogy to the instant labor dispute. On the other hand, the analysis in a second line of cases dealing with communication and property rights and typified by *N.L.R.B.* v. *Babcock and Wilcox Co.* (351 U.S. 105 (1956)) and *N.L.R.B.* v. *Central Hardware Co.* (407 U.S. 539 (1972)) applies expressly to organization campaigns *only*. While these cases provide guidance in framing a rule to be applied in this cause, their principles are not strictly applicable to the facts herein.

concerned efforts to proselytize the public and did not originate on the center's private property or concern the manner in which any employer was operating on this property. This Court in *Lloyd* recognized the public could be reached by the use of mass media or public property and there was no need to intrude upon private property. Similarly, here where the buying public is the target of the Union's protest, mass media can effectively be employed. The retailers use this media to attract customers and it may effectively be used to discourage patronage. There is no need to picket on private property here any more than there was in *Lloyd*. However, the controversy here—unlike that in *Lloyd*—was concerned with the operations elsewhere of a center's tenant. Thus, while *Logan* and *Lloyd* represent points of departure, this Court has as yet formulated no rule to accommodate the rights of property and expression when the purpose of the expressive activity is *indirectly* related to the business of the property.

The formulation of such a rule begins with an examination of a test that is derived by blending *Logan* and *Lloyd*: private property becomes subject to protest or propaganda activity only when both of the following are satisfied: (a) the purpose of the propaganda or expressive activity is at least indirectly related to the business of the property, *and* (b) there exists no reasonably effective alternative means of communication to reach the intended audience.[6]

This test is stated in the conjunctive. Consequently, there is no need to reach (b)—the question of whether alternatives to

6. The court below realized the validity of this test or rule. See Part IV in the decision below. That court misapplied this rule by failing to distinguish between directly and indirectly related protest activity.

private property exist—unless there is first a showing that the purpose of the protest is at least indirectly related to the use to which the property is put.[7]

2. Proof of Absence of Alternative Forums Where the Purpose of Expressive Activity Is Indirectly Related to the Property's Business Must Be Greater Than That Required Where a Direct Relationship Is Present.

While the test derived from Logan—Lloyd supports the Chamber's position, it does not answer the broad issue posed by this case. The Chamber contends that once a relationship between protest activity and the property's use is found, resolution of this issue requires an examination of the quantum and type of proof required on the issue of alternative avenues of communication. The Chamber further contends that when considering the proof required on the issue of alternative forums, it is necessary to distinguish between situations where the protest activity is directly related to the property's purpose and those where there exists but an indirect relationship.[8] This case then requires a consideration of the question left open by *Lloyd* and *Logan*: to what extent must persons who desire to propagandize on private property first demonstrate that alternative avenues of communication do not exist when the purpose of their protest is *indirectly* related to the business of the property. The Chamber believes that the proof of the absence of alternative forums in this indirect relation situation must be greater than that required where the expressive activity is directly related to the business of the property.

7. This Court distinguished *Lloyd* from *Logan* by finding in *Lloyd* that adequate means existed to communicate with the public from nonprivate property. However, a fair reading of *Lloyd* requires the conclusion that where the First Amendment activity is *not* related to the use of the private property, this *fact alone* permits the denial of access to private property, including, e.g., shopping centers, and free standing stores and adjacent parking lots. The majority, in distinguishing *Logan*, stated that that case extended *Marsh* to a shopping center situation where the First Amendment activity "was related to the shopping center activities." This Court in *Lloyd* continued that it was not called upon in *Logan* to "consider whether respondents' property rights could, consistent with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center was put." (407 U.S. at 560.) That open question was answered in *Lloyd* where First Amendment activity was barred because it lacked such a relationship to the purpose of the property sought to be used. Moreover, the *Lloyd* dissent concluded that the majority viewed the case as presenting the issue of whether the owner of a shopping center could bar First Amendment activity which was not related to the purpose or use of the center. 407 U.S. at 577-578. In addition, the Oregon Supreme Court in *Lenrich Associates* v. *Heyda*, 504 P. 2d 112 (1972) interpreted *Lloyd* as holding that when First Amendment activity is not related to the use of private property catering to the public, the property owner may deny access to his property to those who would assert these First Amendment rights. While the *Lloyd* court did not overrule *Marsh*, 326 U.S. 501 (1946) where the speech activity was unrelated to the use of the property, this failure to overrule *Marsh* undoubtedly reflected a view that in the exceptional circumstances of a company-owned town, the "related" test need not be applied strictly. The court in *Lloyd* held that *Marsh* was not intended to apply to shopping center situations. 407 U.S. at 562. In all situations other than the "very special situation of a company-owned town," the *Lloyd-Logan* analysis applies when dealing with speech activity whether this activity is related to or unrelated to the use of the property.

In order to determine the breadth of property rights in this case and to demonstrate the validity of the Chamber's position, judicial precedents in related areas while not determinative should be consulted for their ability to provide guidance. Thus, while employees may have an abstract right to picket their employer wherever he is located,[9] this Court in *Lloyd* recognized that an employer's constitutionally protected property rights are equally valid and deserving of consideration.[10]

8. As stated, the court below failed to consider this necessary distinction. The arguments advanced herein apply whether the property is devoted to retail or nonretail use.

9. See *N.L.R.B.* v. *Local 810 Sheet Metals, etc.*, 460 F. 2d 1 (CA 2, 1962); *Local 761 Electrical Workers* v. *N.L.R.B.*, 366 U.S. 667, 672 (1961).

10. The property rights at stake here are not only the right to be free from trespass but also the right to do business without interference from those who would use private property to protest or propagandize.

The majority's decision in *Lloyd* clearly confers constitutional status to these private property rights and undertakes to weigh these

In addition, the rationale of this Court's organizational campaign decisions, *Babcock* and *Central Hardware*, provides guidance in resolving the issue here, since it demonstrates this Court's concern for property rights, though these cases involve situations where expressive activity is directly related to the business of the private property, and therefore, do not isolate the variables present here.[11] Thus, the instant matter concerns consumer picketing rights where the dispute, as demonstrated, is not directly related to the business of the property involved. By contrast, *Babcock* and *Central* were explicitly limited to organizational rights. Organizational campaigns involve efforts by a union to utilize private property to unionize employees working on that property. The labor disputes in these cases originate and

rights against the First Amendment rights of parties seeking to use private property as a forum:

> "* * * The Due Process Clauses of the Fifth and Fourteenth Amendments are also relevant to this case. They provide that 'no person shall . . . be deprived of life, liberty, or property, without due process of law.' There is the further proscription in the Fifth Amendment against the taking of 'private property . . . for public use, without just compensation.'"
>
> "We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assure due protection of both, are not easy. But on the facts presented in this case, the answer is clear." 407 U.S. at 567; 570.

It is undisputed that shopping centers, while open to the business public, retain their character as private property. Thus, this Court in *Lloyd* acknowledged that while a shopping center is open to the public for business purposes, it does not lose its private character, "merely because the public is invited to use it for designated purposes . . . [t]he essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center." 407 U.S. at 569. The *Lloyd* court also stated that privately owned streets and walks in a shopping center are not the equivalent of municipally owned streets for speech activity purposes. 407 U.S. 565.

11. *N.L.R.B.* v. *Babcock and Wilcox Co.*, 351 U.S. 105 (1956); *N.L.R.B.* v. *Central Hardware Co.*, 407 U.S. 539 (1972).

are centered at the site of the union's propaganda activity. These disputes are directly related to the site's use because they concern the nonunion method by which an employer is operating on that site. Thus, in organizational cases, an employer, unlike Hudgens here, has an ability to curtail the expressive activity by acceding to the union's demands. Furthermore, during unionization campaigns, this Court in *Babcock* and *Central* has granted employees rights superior to those given to nonemployees. Thus, under *Babcock* and *Central* in order to vouchsafe the explicit statutory right of employees to organize themselves into unions, this Court has permitted employees, as opposed to strangers, to solicit for union membership on their employer's property regardless of the availability of alternative public forums.[12] This Court has recognized that when employees are on their employer's property in connection with their job duties, private property rights are not at stake. Therefore, the rights to be accommodated include only the right of organization and the employer's right to insure discipline, safety and production, with the former right generally prevailing.[13]

However, even in the organizational context this Court has not abandoned concern for property rights. Rather, this Court has decreed that unlike employees, nonemployee union organizers who come onto private property to solicit for union membership or to advertise the advantages of a union can justify their presence there only if they can demonstrate that this presence has a cogent relationship to the employees' exercise of the guaranteed right to organize. A nonemployee seeking to use private property to organize employees has the *burden of proving* that his audience

12. The guaranteed right of self-organization coupled with the recognition that the employer's property is the place uniquely appropriate for *employees* to freely associate with other employees form a logical basis to accord employees the right to solicit other employees on their employer's property during organizational campaigns; the communication among employees is a threshold concern during an organizing campaign and vital to that campaign's success.

13. *Republic Aviation Co.* v. *N.L.R.B.*, 327 U.S. 793 (1945); *N.L.R.B.* v. *Seamprufe Inc.*, 222 F. 2d 860 (CA 10, 1955).

cannot be reached elsewhere through the use of reasonable efforts. See, *Central Hardware Company* v. *N.L.R.B.*, 468 F. 2d 252 (CA 8, 1972) on remand from this Court. *Babcock* at page 112.[14] Thus, while the Labor Act has assumed that no public forum constitutes a reasonable alternative to the employer's property for *employees* to attempt to unionize other *employees*, in no other situation is this assumption made. In other situations where nonemployees or off-duty employees desire to organize employees, it is instead presumed that reasonable and effective alternatives to private property do exist and may be used to convey messages.[15]

Following the guidance of *Babcock* and *Central*, it is evident that this Court has acknowledged that the long standing and constitutionally protected rights of private property should not lightly give way even to organizational activity directly related to the use of the property. (*Central* at 544-6.) It follows that property rights should be more stringently guarded in situations such as the instant case when the purpose of the expressive activity is but indirectly related to the use of the property. That is, since the users of the private property to be subjected to protest activity *not directly* related to the property's purpose

14. Furthermore, it has been held that employees while off duty enjoy only the access rights to private property that are granted to strangers. *GTE Lenkurt, Inc.*, 204 NLRB No. 74 (1973); *N.L.R.B.* v. *Great Atlantic & Pacific Tea Co.*, 277 F. 2d 759 (CA 5, 1960); *Diamond Shamrock Co.* v. *N.L.R.B.*, 443 F. 2d 52 (CA 3, 1971). These holdings demonstrate that the interests to be balanced differ, depending upon whether on or off duty employees are involved. Thus, while the presence of on duty employees on their employer's property does not bring private property rights into focus, when off duty employees seek admission to private property for the sole purpose of soliciting union support, property rights are directly put in issue, just as these rights are at issue when nonemployees seek admission for a similar purpose. It is logical that both off duty employees and nonemployees should be considered invitees to the same extent and entitled to identical admission rights to private property when they seek to employ this property for the purpose of unionizing.

15. In nonorganizational situations such as the instant case this presumption is made where employees or nonemployees desire to engage in expressive activity that is at least indirectly related to the property's business purpose. (*Logan-Lloyd* test, *supra.*)

have no control over the duration or scope of this activity (except by excluding the protesters) there should be no occasion to open this property to such activity absent a conclusive demonstration of a compeling need due to the lack of alternative public forums.

An analysis of the record below utilizing the criteria here proposed compels the conclusion that the strikers have not succeeded in meeting their burden to demonstrate the unavailability of effective alternative public forums and were properly excluded from Hudgens' center.[16] These strikers sought to reach with their message the large segment of the public who at sometime would purchase the products which were sold by Butler and his competitors. This conclusion is buttressed by the breadth and purpose of the picketing itself. The strikers picketed (or attempted to picket) each of their employer's ten locations including all of his retail outlets in the metropolitan Atlanta area. Their evident intent was to persuade the public, who at some occasion would require shoes and related products, to purchase these products from others, rather than from their employer and so bring economic pressure to bear upon their employer; he would then be forced to yield to their union's bargaining position.

Once it is accepted that the purchasing public was the target of the pickets, alternatives to the center's private property become readily apparent. Some of these alternatives include newspapers, radio and television.[17] These media are utilized to

16. As stated, the Chamber believes that the standard here proposed reflects the variables present in the instant case. However, the Chamber also contends that even under what it believes to be the more lenient *Babcock* principles, Hudgens properly excluded the strikers from its private property since pursuant to *Babcock's* directives they did not satisfactorily demonstrate the absence of alternative public forums.

17. In the 1974 strike conducted by the Amalgamated Clothing Workers of America against Farah Manufacturing Company, the union in a nationwide campaign, discussed *infra*, engaged in extensive mass media advertising in an effort to encourage the general public to cease buying Farah products sold by retailers.

As an indication of means which other unions have success-

encourage patronage at the Hudgen's center and could as effectively be employed to discourage patronage. Indeed, the record reveals that the use of such media would be less expensive than the cost of maintaining pickets at Butler's nine retail outlets. The record also discloses that the time spent picketing could have been more effectively utilized by advertising on mass media.

3. Property Rights Must Be Guarded from the Intimidatory Effects of Picketing When the Purpose of This Activity Is Indirectly Related to the Business of the Property.

This Court has recognized the intimidatory effect of picketing. Thus, this Court has observed that picketing, unlike other modes of persuasion, has the propensity to implicate the public and to persuade it to refrain from entering into advantageous relations with the business establishments that are involved—however indirectly—in the dispute. In the words of the Court,

> "But while picketing is a mode of communication it is inseparably something more and different. Industrial picketing 'is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite

fully employed in analogous situations, with only slight exercise of diligence and ingenuity, we refer this Court to a study made in 1967 of the activities of the Retail Clerks Union, as revealed in editions of its magazine, "The Retail Clerk's Advocate." Not all such devices or alternatives would be appropriate in this or any case, but they reveal what can be achieved by a union which is willing to accept its duty. These alternatives included, for example, a consumer boycott involving the use of balloons and bumper stickers (June, 1967, page 3); announcements on national television (July, 1967, page 18), at state and county fairs, holiday celebrations and other festivals (October, 1967, page 12); extensive distribution of shopping bags with imprinted messages which recipients would tend to retain more than handbills (June, 1967, page 5 and October, 1967, page 12); outdoor billboards (July, 1967, page 14); sponsorship of local radio and television programs (October, 1967, page 12 and April, 1967, page 16); sponsorship of local sports teams (October, 1967, page 28); union industry exhibits (July, 1967, page 14); and a caravan of automobiles with signs inviting spectators' attention (January, 1967, page 28).

> irrespective of the nature of the ideas which are being disseminated.' Mr. Justice Douglas, joined by Black and Murphy, JJ, concurring in *Bakery & Pastry Drivers & Helpers Local* v. *Wohl*, 315 U.S. 769, 775, 776. Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word." *Hughes* v. *Superior Court*, 339 U.S. 460, at 464-5 (1950).[18]

It is evident that private property rights must be shielded from picketing especially when, as here, the picketing has no direct relationship with the business of the shopping center. The standard suggested by the Chamber will accomplish this purpose while simultaneously affording due regard to the expressive needs of others. Indeed, it is this standard that recognizes the rights of shopping center users—owners and tenants—to conduct their business free from trespass and without interference from those who would use private property to protest or propagandize. That is, the Chamber's suggested standard will, in most instances, prevent the owner and tenants of private property from becoming entangled in the effects of picketing designed to support disputes over which they have no control, since these disputes do not originate on the owner's property or concern the labor relations at that property of any facility. Conversely, if a lesser standard than that suggested by the Chamber is employed to balance property and picketing rights, private property will become a battleground for pickets to utilize to espouse their many campaigns which are not directly related to the property's business, with scant regard for the availability of alterative public forums or other effective communication techniques.

18. See, in addition, Teller, *Picketing and Free Speech*, 56 Harv. L. Rev. 180, 200-02 (1942); Dodd, *Picketing and Free Speech: A Dissent*, 56 Harv. L. Rev. 513, 517 (1943).

The Court below failed to accept the Chamber's position, expressing instead the fear that retail chains could locate their outlets in shopping centers and prevent direct *picket* contact with customers at all stores except that where the dispute originated. However, the court below in reaching this conclusion failed to consider that effective alternatives to picketing to communicate with the consumer public do exist and, in addition, failed to take cognizance of the intimidatory effect of picketing.

As an example of this effect, recently the Amalgamated Clothing Workers of America, AFL-CIO, and other labor organizations engaged in a nationwide outburst of picketing on private property devoted to retail selling in support of a strike against one nonretail establishment, Farah Manufacturing Co. Farah manufactured clothing sold at the picketed retail establishments. While the picketing arguably was in compliance with this Court's *Tree Fruits doctrine* (337 U.S. 58, 1964), the union's clear and admitted secondary objective was to compel the neutral retailers selling merchandise manufactured by Farah to cease doing business with that company with whom the union had its primary dispute. The target of the union was the nation's consuming public. The labor dispute did not originate on the retail property picketed and did not concern the labor relations of any facility on that property. Had the standards suggested here by the Chamber been then adopted, in many, if not all, instances the pickets would have been compelled to utilize alternative avenues of communication, since it is patent that they could not demonstrate that direct picketing on private property was their only effective means to reach their large intended audience.

Here, then, and in Farah the deleterious effect to private property caused by consumer picketing far outweighs the necessity to utilize this property for this protest activity. Accordingly, this Court should require strict and compelling proof by the unions that alternative forums are unavailable before requiring private property to open to consumer picketing, particularly where the underlying labor dispute did not originate on this property.

The test suggested here by the Chamber balances the competing rights of property and communication giving due regard to each; the Chamber urges that this test be adopted by this Court to apply to situations where the purpose of the protest activity is not directly related to business of the private property.

CONCLUSION.

For all the foregoing reasons and those expressed by the Petitioner, the Chamber urges that the judgment of the Court of Appeals be reversed and this case be remanded to that court with instructions to deny enforcement of the Board's order.

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